85-1520

No.

Supreme Court, U.S.
FILED
MAR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
PAUL J. LARKIN, JR.
Assistant to the Solicitor General
BARBARA L. HERWIG
RICHARD A. OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

54 pp

QUESTION PRESENTED

In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court held that government officials performing discretionary functions are entitled to qualified immunity from damages liability so long as their conduct does not violate clearly established constitutional rights. In this case, the court of appeals held that petitioner was not entitled to qualified immunity for his warrantless entry of respondents' residence, because it was clearly established that the warrantless entry of a house is unlawful in the absence of exigent circumstances.

The question presented is the following: When the general legal rule relevant to the constitutionality of an official's behavior makes reference to the circumstances of the particular case, is the qualified immunity provided by *Harlow* overcome by a mere showing that the general legal rule was well established, or must the court further determine that the official could not have reasonably believed that his own conduct was lawful in light of the facts and circumstances as they reasonably appeared to him.

PARTIES TO THE PROCEEDING

The petitioner is Russell Anderson. The respondents are Robert E. Creighton, Jr., and Sarisse Creighton, the plaintiffs in this case who brought suit on their own behalf and on behalf of their children, Shaunda Creighton and Tiffany Creighton.

The City of St. Paul and St. Paul police officers John J. DeNoma, Kevin T. Daniels, Robert C. Ashton, John J. Gelao, William A. Snyder, and Jerome P. Stephan were defendants in the district court, but their cases were remanded to state court and they did not appear in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Reasons for granting the petition	9
Conclusion	22
Appendix A	1a
Appendix B	18a
Appendix C	27a

TABLE OF AUTHORITIES

Cases:

Bailey v. *Turner*, 736 F.2d 963 20
Bass v. *Wallenstein*, 769 F.2d 1173 21
Beck v. *Ohio*, 379 U.S. 89 16
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 ..... 5, 17
Briggs v. *Malley*, 748 F.2d 715, aff'd, No. 84-1586 (Mar. 5, 1986) 10, 11, 12, 13, 14, 15, 19, 20
Chagnon v. *Bell*, 642 F.2d 1248, cert. denied, 453 U.S. 911 12
Davis v. *Scherer*, No. 83-490 (June 28, 1984) .. 10, 11, 13
Dorman v. *United States*, 435 F.2d 385 ..... 6, 16
Evers v. *Country of Custer*, 745 F.2d 1196 20
Floyd v. *Farrell*, 765 F.2d 1 19
Franks v. *Delaware*, 438 U.S. 154 18
Fujiwara v. *Clark*, 703 F.2d 357 21
Harlow v. *Fitzgerald*, 457 U.S. 800 ..... *passim*
Hill v. *California*, 401 U.S. 797 18

Cases—Continued: Page

Hobson v. *Wilson*, 737 F.2d 1, cert. denied, No. 84-1139 (Mar. 25, 1985) 20
Illinois v. *Gates*, 462 U.S. 213 .....15, 18
LeSavage v. *White*, 755 F.2d 814 20
Llaguno v. *Mingey*, 763 F.2d 1560 16-17
McDonald v. *United States*, 335 U.S. 451 17
Mitchell v. *Forsyth*, No. 84-335 (June 19, 1985) 10, 12, 13
New York v. *Quarles*, No. 82-1213 (June 12, 1984) 14
O'Hagan v. *Soto*, 725 F.2d 878 21
Payton v. *New York*, 445 U.S. 573 16
Pierson v. *Ray*, 386 U.S. 547 .....13, 14, 18
Procunier v. *Navarette*, 434 U.S. 555 .....12, 14
Salvador v. *United States*, 505 F.2d 1348 16
Scheuer v. *Rhodes*, 416 U.S. 232 12
Terry v. *Ohio*, 392 U.S. 1 14
Trejo v. *Perez*, 693 F.2d 482 21
United States v. *Baldacchino*, 762 F.2d 170 ... 16
United States v. *Campbell*, 581 F.2d 22 16
United States v. *Hultgren*, 713 F.2d 79 17
United States v. *Karo*, No. 83-850 (July 3, 1984) 16
United States v. *Kulcsar*, 586 F.2d 1283 ....6, 16, 19
United States v. *Leon*, No. 82-1771 (July 5, 1984) 11
United States v. *Manfredi*, 722 F.2d 519 17
United States v. *Martinez-Gonzalez*, 686 F.2d 93 16
United States v. *Santana*, 427 U.S. 38 16
United States v. *Sharpe*, No. 83-529 (Mar. 20, 1985) 15
United States v. *Shye*, 492 F.2d 886 16
United States v. *Titus*, 445 F.2d 577, cert. denied, 404 U.S. 957 17

Cases—Continued:

Page

Vance v. *North Carolina*, 432 F.2d 984 16
Warden v. *Hayden*, 387 U.S. 294 .....6, 16
Welsh v. *Wisconsin*, 466 U.S. 740 16
Whitley v. *Albers*, No. 84-1077 (Mar. 4, 1986) ..9, 21
Wood v. *Strickland*, 420 U.S. 308 .....12, 14
Zook v. *Brown*, 748 F.2d 1161 20

Constitution and statutes:

U.S. Const.:
Amend. IV 5, 7, 14, 15, 17, 19
Amend. VI 21
Amend VIII 21
42 U.S.C. 1983 ..... 5, 7
42 U.S.C. 1985 7

Miscellaneous:

LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. Mich. J.L. Ref. 417 (1984) 17
1 W. LaFave, *Search and Seizure* (1978) 18

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Russell Anderson, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 766 F.2d 1269. The opinion of the district court (App., *infra*, 18a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1985. A petition for rehearing was denied on October 15, 1985 (App., *infra*, 27a). On January 4, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including March 14, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Shortly before 3:30 p.m. on Veterans Day, November 11, 1983, the Minnesota Federal Savings and Loan in St. Paul, Minnesota, was the subject of an armed robbery. App., *infra*, 19a. Petitioner, a special agent of the Federal Bureau of Investigation (FBI), was contacted at home and immediately went to the bank to begin his investigation. Petitioner arrived at roughly 4:30 p.m., and, along with two other FBI agents and St. Paul police officers, interviewed several eyewitnesses to the robbery. From persons who were at the scene of the robbery and who were in the neighborhood, petitioner learned that the robber had used a getaway car that was described as burgundy or maroon and silver in color, possibly darker and possibly a Buick. From a teller, petitioner also obtained a description of the bank robber, whom petitioner believed was Vadaain Dixon. At 6:30 p.m., petitioner went to a local police station, where he helped prepare a photographic display for the two bank tellers who had seen the robber. The tellers arrived at 7:30 p.m., and a half-hour later each teller independently and positively identified Dixon as the bank robber by selecting his photograph from a 12-photo display. App., *infra*, 19a, 20a; Affidavit of Russell Anderson para. 2-8, at 1-5 (Apr. 16, 1984).[1]

Petitioner was familiar with Vadaain Dixon, because Dixon had a long history of armed robbery and violence dating back to 1974.[2] Dixon had been arrested in May 1983 and charged with committing seven bank robberies,

---

[1] Several days later, an accomplice to the robbery was arrested and gave a statement naming Vadaain Dixon as the robber. App., *infra*, 19a n.1; Affidavit of Russell Anderson para. 7, at 3.

[2] For example, in August 1979, shortly after being released from state prison, Dixon robbed a liquor store in St. Louis Park, Minnesota, and took a hostage at gunpoint. Affidavit of Russell Anderson para. 9, at 5-6.

one of which occurred in the Twin Cities area, and he had pleaded guilty in October 1983 to four of those robberies. Following the entry of his guilty pleas and pending the completion of a presentence investigation, Dixon had been assigned to the Volunteers of America half-way house, where he was permitted daily four-hour furloughs. However, Dixon did not return to the half-way house by 6:00 p.m. on November 9, 1983, and a warrant for his arrest issued. App., *infra*, 19a-20a; Affidavit of Russell Anderson para. 7, at 3-4, para. 9, at 5-6; Affidavit of William Johnson para. 4, at 2, para. 6, at 3 (June 4, 1984).

From his investigation of Vadaain Dixon's robberies, petitioner also knew that Dixon had used an accomplice in each of the four robberies to which he had pleaded guilty, and that Dixon's wife Cheryl had admitted driving the getaway car on two of those occasions. Moreover, petitioner had been informed by Dixon's probation officer that Cheryl Dixon had been residing at the home of respondents Robert and Sarisse Creighton, Vadaain Dixon's sister, from the time of the arrest in May 1983, for one of the bank robberies charged against Vadaain Dixon, until November 9, 1983. While there, Cheryl Dixon often used the Creightons' car to drive her husband to and from the half-way house so that they could spend his daily furloughs together at the Creightons' residence. App., *infra*, 20a; Affidavit of Russell Anderson para. 7, at 3-4, para. 12, at 7; Affidavit of William Johnson paras. 5-6, at 2-3.

After the bank tellers identified Vadaain Dixon, petitioner and the police officers decided that Dixon should be apprehended as swiftly as possible, given his history of violence. Petitioner and the police officers immediately proceeded to the home of Dixon's mother, Iris.[3] With her

[3] Her home was closer to the police station and to the bank than the Creightons' house, and Vadaain Dixon's brother Jamie, who had once helped Vadaain and Cheryl Dixon escape after a prior robbery, was staying there. App., *infra*, 20a-21a & n.2.

consent, petitioner and the police officers searched for Dixon, unsuccessfully. Dixon's brother Jamie, who was there at the time, told petitioner that the Creightons owned a red Oldsmobile and said that Vadaain Dixon might be at their grandmother's home. Because the grandmother's home was en route to the Creightons, petitioner and the police went there next, but they again did not find Vadaain Dixon. In the meantime, the local police confirmed from a computer check that the Creightons owned a burgundy or maroon Oldsmobile, which was similar to the getaway car used in the bank robbery. App., *infra*, 20a-21a & n.2; Affidavit of Russell Anderson paras. 10-12, at 6-7.

At approximately 8:40 p.m., petitioner and the police officers arrived at the Creightons' home. The facts are in dispute regarding what transpired at the Creightons' home during the ensuing search for Vadaain Dixon.[4] However, several facts are uncontested. During the course of the search, respondent Sarisse Creighton and her children became quite distraught. App., *infra*, 2a-4a, 21a. Respondent Robert Creighton was struck by a St. Paul policeman, was arrested for obstructing legal process, and was released the following day without being charged with an offense. *Id.* at 3a-4a, 22a. Petitioner had nothing to do with the incident in which Robert Creighton was injured. *Id.* at 22a, 24a n.4.[5] And neither Vadaain nor Cheryl Dixon was found at the Creightons' home.

---

[4] Compare Affidavit of Russell Anderson paras. 14-18, at 8-10, with Affidavit of Robert Creighton, Jr. 2-3 (May 30, 1984); Affidavit of Iris Dixon 4-5 (May 30, 1984); Affidavit of Sarisse Creighton 2-6 (May 30, 1984).

[5] According to petitioner, respondent Robert Creighton provoked a St. Paul police officer by attempting to grab his weapon. App., *infra*, 22a; Affidavit of Russell Anderson para. 16, at 9. According to respondent Robert Creighton, the police officer's assault was unprovoked. App., *infra*, 3a; Affidavit of Robert Creighton, Jr. 2-3. However, since this appeal involves only the question of petitioner's

2. Respondents later brought suit in state court against petitioner and several other defendants,[6] claiming, inter alia, that the officers' warrantless entry into their house violated the Fourth Amendment, and seeking damages from petitioner and the other defendants under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and 42 U.S.C. 1983. After removing this suit to federal court, petitioner moved for summary judgment on the ground that he was entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), because his warrantless entry was not clearly established as unlawful under the circumstances. The district court granted petitioner's motion, ruling that his warrantless entry into the Creightons' house did not violate the Fourth Amendment. App., *infra*, 23a-26a.

Focusing on the facts of this case as known by petitioner, the district court held that petitioner had probable cause to believe that Vadaain Dixon had robbed the St. Paul bank[7] and that Dixon was at the Creightons' residence.[8] App., *infra*, 23a. The court also held that peti-

---

entitlement to qualified immunity on the charge of unlawful entry, the facts concerning what transpired during the actual search of the Creightons' home are irrelevant.

[6] Repondents Robert and Sarisse Creighton brought this suit in their own behalf and on behalf of their children against petitioner, the City of St. Paul, several identified St. Paul police officers, and others unknown to them.

[7] In making this ruling, the district court relied on the witnesses' description of the robber, the tellers' identification of Vadaain Dixon from the photo display, and Dixon's past criminal activity and current fugitive status. App., *infra*, 23a.

[8] The district court relied on the following facts: the probation officer who was performing Dixon's presentence investigation had told petitioner that Dixon's wife had said that she was residing with the Creightons and was using their car; Vadaain Dixon himself had admitted that his wife was living with the Creightons and used their car so that they could spend his furloughs together; petitioner knew that

tioner's warrantless search was lawful because there were exigent circumstances justifying an immediate entry into the Creightons' home to arrest Dixon and to prevent him from disposing of evidence of the robbery. *Id.* at 23a-24a & nn.3-4.[9] Finally, relying, inter alia, on *Warden* v. *Hayden*, 387 U.S. 294 (1967), the court held that petitioner's warrantless entry was lawful because at the time that he entered the Creightons' residence he was still in "hot pursuit" of Dixon (App., *infra*, 24a-25a).[10] Accordingly, the

---

Dixon's wife had been his accomplice on past occasions; and Dixon's brother had told petitioner that the Creightons owned a burgundy or red car that matched the description of the getaway car used in the robbery, a fact confirmed by the St. Paul police from a computer check. App., *infra*, 23a.

[9] In so ruling, the district court relied on the following factors, first identified by the District of Columbia Circuit in *Dorman* v. *United States*, 435 F.2d 385, 392-393 (1970) (en banc), and previously applied by the Eighth Circuit in *United States* v. *Kulcsar*, 586 F.2d 1283, 1287 (1978), as considerations in determining whether the warrantless entry of a home to arrest a suspect is permissible: (1) armed robbery is a grave offense; (2) Vadaain Dixon was reasonably believed to be armed and dangerous, given his past record and his status as fugitive; (3) petitioner had probable cause to believe that Dixon had committed the bank robbery; (4) petitioner had probable cause to believe that Dixon was at the Creightons' home; (5) it was likely that Dixon would escape if he were not swiftly apprehended, given his status as a fugitive, his access to an automobile, and his proceeds from the robbery; and (6) petitioner's initial entry into the Creightons' home was peaceful, and the violent acts, which petitioner was not alleged to have committed, occurred after the entry. App., *infra*, 23a-24a & nn. 3-4.

[10] As the district court explained, petitioner entered the Creightons' house only 40 minutes after the bank tellers had identified Vadaain Dixon as the robber, and petitioner's entry was the culmination of his continuous efforts to identify the robber and to locate Dixon once he had been identified. App., *infra*, 25a.

~~finally, the~~ court held that petitioner was entitled to qualified immunity under *Harlow*, because his warrantless entry did not violate the Fourth Amendment. *Id.* at 25a & n.5.[11]

3. The court of appeals reversed and remanded the case for trial (App., *infra*, 1a-17a). At the outset, the court of appeals held that the district court erred in granting summary judgment for petitioner regarding the lawfulness of his entry into the Creightons' residence, on the ground that there were disputed questions of material fact whether petitioner had probable cause to believe that Dixon was at the Creightons' house. *Id.* at 7a-12a.[12] The court also

---

[11] The district court also dismissed the 42 U.S.C. 1983 claim against petitioner, on the ground that he did not act under color of state law, as well as the 42 U.S.C. 1985 claim against petitioner, on the ground that respondents had not pleaded the requisite class-based animus. App., *infra*, 26a. In addition, the court dismissed the state law tort claims against petitioner. *Ibid.* Finally, the court granted the motion filed by the remaining defendants to remand the case to state court. *Ibid.* Respondents did not appeal these aspects of the district court's order. *Id.* at 5a.

[12] The court of appeals found that petitioner's description of the getaway car was ambiguous at best and, when construed in repondents' favor, described "a two-tone red *and* silver car" (App., *infra*, 9a (emphasis in original)), while respondents owned a solid maroon car. The court also credited respondents' claim that discovery would have shown that a local newspaper had reported the following day that the FBI stated that no getaway car had been seen and that the St. Paul police asked one of their neighbors about a red and silver car with yellow license plates, whereas the Creightons' car had white-and-blue plates. *Ibid.* Second, the court criticized petitioner for not obtaining a search warrant the day before the robbery, since he then knew that Vadaain Dixon had jumped his bond. *Id.* at 10a. Moreover, the court credited respondents' affidavits that Cheryl Dixon had not resided with them since the summer of 1983. *Id.* at 11a. The court also stated that petitioner should have been skeptical regarding the truth of Vadaain and Cheryl Dixon's statements to her husband's probation officer that she was living with respondents and using their car. *Id.* at 11a-12a. Finally, the court stated that the information known to petitioner suggested that Cheryl Dixon had been living at the Creightons' house only up to November 1, not November 11. *Id.* at 12a.

found that the hot pursuit exception to the warrant requirement was not applicable, because petitioner was not in continuous pursuit of Dixon from the time that the robbery occurred (*id.* at 12a-13a), and the court found no evidence to support the claim that a warrantless entry was necessary to prevent the destruction of evidence (*id.* at 13a-14a). Finally, the court ruled that the exigent circumstances exception did not apply, because there were disputed facts as to whether petitioner had a " 'strong reason' " to believe that Dixon was at the Creightons' house, whether Dixon would escape if not immediately apprehended, and whether the entry was peaceful. *Id.* at 14a-15a.

In a brief discussion of the question, the court of appeals also held that petitioner was not entitled to qualified immunity, since it was clearly established that the warrantless entry of a home was unlawful in the absence of exigent circumstances. App., *infra*, 15a-17a. The court explained that " 'if the law was clearly established, the immunity defense ordinarily should fail[,] since a reasonably competent public official should know the law governing his conduct' " (*id.* at 16a (quoting *Harlow*, 457 U.S. at 818-819)). Then, adverting to its earlier discussion of the lawfulness of petitioner's entry, the court held that "the Creightons' fourth amendment rights and the 'exigent circumstances' doctrine were 'clearly established' " at the time of petitioner's entry (App., *infra*, 16a) and that "[petitioner] has cited no persuasive reason why he could reasonably have been unaware of this clearly established law" (*id.* at 17a). Accordingly, without undertaking to decide whether petitioner's own actions were clearly unlawful under well-established law, the court of appeals held that he was not entitled to qualified immunity.

REASONS FOR GRANTING THE PETITION

This case present an important, unsettled, and recurring question concerning the proper standard for resolving a claim of qualified immunity by public officials in general, and by law enforcement officers in particular. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court held that a public official is entitled to immunity from liability in damages when his conduct is objectively reasonable as measured by reference to clearly established law. In this case, the court of appeals held that the only inquiry required by *Harlow* is simply whether the general principles of law governing a police officer's actions—such as probable cause and exigent circumstances—were clearly established at the time in question and that no consideration of the lawfulness of the police officer's own conduct in the case at hand is necessary or permissible. The court of appeals altogether refused to undertake this latter inquiry, ending its analysis once it concluded that the warrantless entry of a home was forbidden in the absence of exigent circumstances and that this principle was clearly established at the time of petitioner's entry.

That ruling, which conflicts with decisions of this Court and several other courts of appeals, nullifies the qualified immunity defense in the situations that will most frequently arise and in which the defense is most necessary: *i.e.*, when the application of a settled rule of law to the particular facts confronting a law enforcement officer is problematic. This Court recognized the significance of this question by granting certiorari to decide it in *Whitley* v. *Albers*, No. 84-1077 (Mar. 4, 1986), but the Court did not reach the question, because it resolved the case on other grounds (slip op. 15). Accordingly, review here is clearly warranted.

1. The court of appeals held that petitioner was not entitled to qualified immunity because it was clearly established at the time that he entered the Creightons' resi-

dence that a warrantless entry of a home was unlawful in the absence of probable cause and exigent circumstances. However, the court of appeals did not determine whether petitioner's own conduct was clearly unlawful; instead, the court resolved this issue simply by reference to the general Fourth Amendment principles set forth by that court and this one. In so ruling, the court of appeals seriously misread this Court's decisions and misapplied the principles governing the qualified immunity defense.

a. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the Court held that government officials performing discretionary functions are entitled to immunity from damages liability so long as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known. See also *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18. The focus of the inquiry, the Court explained, should be on "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." 457 U.S. at 818 (footnote omitted). The Court's subsequent decisions in *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), and *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), make clear that the existence of a general legal standard serves only as the beginning of the analysis under *Harlow*, not the end, and that the approach followed by the court of appeals was in error.

The question in *Davis* was whether the failure of state officials to provide a state employee with a hearing before he was discharged violated his clearly established due process rights. In ruling that the officials were entitled to qualified immunity, the Court acknowledged that its prior decisions had required " 'some kind of a hearing' " in this setting (slip op. 8 n.10 (citation omitted)), but found that the employee's right to a pretermination hearing was not clearly established since "the Court had not determined what kind of a hearing must be provided" or "specif[ied]

any minimally acceptable procedures for termination of employment" (*ibid.*). Examining the procedures actually afforded to the discharged employee, the Court found that the state officials were "[n]o[t] * * * unreasonable" in concluding that the discharged employee received what due process demanded. *Id.* at 8. *Davis* thus makes clear that the existence of a general legal standard does not resolve the qualified immunity analysis under *Harlow* and that the lawfulness of the defendant's conduct in the particular situation at issue must be clearly established for an immunity defense to fail.

Malley v. *Briggs, supra*, confirms that conclusion. There, in rejecting the contention that a police officer is entitled to absolute immunity for an arrest based on a warrant, the Court reaffirmed that under *Harlow* a police officer is entitled to qualified immunity "if [he] acted in an objectively reasonable manner" (*Malley*, slip op. 5), which must be resolved by reference to the facts and circumstances confronting the official (*ibid.*). Moreover, *Malley* expressly held that "the same standard of objective reasonableness that we applied in the context of a suppression hearing in [*United States* v. *Leon*, No. 82-1771 (July 5, 1984)] defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest" (*Malley*, slip op. 8 (footnote omitted)), and the Court's decision in *Leon* requires an analysis of the facts known to the officer himself (see *Leon*, slip op. 27).[13] As the Court in *Malley* summarized

---

[13] *Leon* held that evidence seized under an invalid search warrant should not be suppressed at trial because, on the facts of that case, "the officers' reliance on the magistrate's determination of probable cause was objectively reasonable." Slip op. 27. As the Court explained, the "application for a warrant clearly was supported by much more than a 'bare bones' affidavit," which, in turn, "provided evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." *Ibid.*

(slip op. 5): "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." See also *Mitchell* v. *Forsyth*, slip op. 23 n.12 (noting that, although a public official will not be immune simply because the warrant requirement has not previously and expressly been held applicable in identical circumstances, "in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law"). *Malley* therefore demonstrates that the court of appeals erred by failing to determine whether petitioner should have known that his warrantless entry into the Creightons' home was clearly unlawful.[14]

b. That conclusion is fully consistent with—in fact, it is compelled by—the principles underlying the qualified immunity doctrine. "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974); see also *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975); *Chagnon* v. *Bell*, 642 F.2d 1248, 1261 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981). When a general principle of law is not clearly established, *Harlow* provides that a government official cannot be saddled with personal liability, because an official "[cannot] reasonably be

---

[14] The Court's judgment in *Malley* also makes this clear. In remanding the case for further proceedings, the Court expressly held that "whether [the officer's] conduct *in this case* was in fact objectively reasonable * * * must be resolved on remand." Slip op. 9 n.8 (emphasis added).

expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful" (457 U.S. at 818). See also *Forsyth*, slip op. 22-23; *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967) ("a police officer is not charged with predicting the future course of constitutional law"). The same considerations also apply when the question is how a court will apply a general legal standard to the particular facts confronting a government official.

The broad standards contained in the constitutional text—such as "due process," "equal protection," or "cruel and unusual punishment"—do not by themselves necessarily provide sufficient guidance to a public official to conform his conduct to constitutional requirements, even when there is no dispute that those standards are themselves firmly established. If the establishment of a general legal standard were by itself sufficient to deprive a public official of qualified immunity, an official would often have no way of knowing whether his decisions might later provide the basis for a suit for damages. Imposing damages liability on a public official in those circumstances would force him to make the same type of prediction that *Harlow* found to be unwarranted when the general rule of law was not itself clear. Moreover, the imposition of damages liability on a public official simply because he has trespassed on an already-existing, but abstract, general legal standard would eliminate the qualified immunity defense in every case in which there is a "legitimate question" (*Forsyth*, slip op. 23 n.12) or a "reasonable * * * disagree[ment]" among public officials (*Malley*, slip op. 5) regarding how the courts will apply that standard to a particular set of facts. That result would "disrupt the balance * * * between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis*, slip op. 11. As the Court has recognized, "[t]he imposition of

monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious [official] from exercising his judgment independently, forcefully, and in a manner best serving" the public interest (*Wood* v. *Strickland*, 420 U.S. at 319-320). It would, instead, "contribute not to principled and fearless decision-making but to intimidation" (*Pierson*, 386 U.S. at 554)—the very result that qualified immunity has always been designed to prevent. See *Harlow*, 457 U.S. at 818-819; *Procunier*, 434 U.S. at 562; *Wood*, 420 U.S. at 319. The court of appeals' truncated approach to the question whether petitioner was entitled to qualified immunity would lead to these unfortunate results.

c. The importance, in resolving a qualified immunity claim, of focusing on the application of a general principle of law to the specific conduct at hand is particularly evident where a law enforcement officer is alleged to have violated the Fourth Amendment. Law enforcement officers normally are not trained legal technicians, yet they are expected to make quick decisions, often involving complicated legal issues, " 'in the midst and haste of a criminal investigation' " (*Malley*, slip op. 5 (Powell, J., concurring in part and dissenting in part) (citation omitted)) that can take place in "rapidly unfolding and often dangerous situations on city streets" (*Terry* v. *Ohio*, 392 U.S. 1, 10 (1968)). Countless officers in the field must make daily decisions under difficult circumstances and without the opportunity for reflection that the courts will have if a suit is later brought against the officer. The legal questions that stem from the actions that a police officer must take "[i]n a kaleidoscopic situation * * * where spontaneity rather than adherence to a police manual is necessarily the order of the day" (*New York* v. *Quarles*, No. 82-1213 (June 12, 1984), slip op. 6) can easily leave room for disagreement among the judges who must later

resolve these matters. Where that is true, there is no basis for faulting an officer who made a reasonable but erroneous judgment regarding the existence of probable cause or exigent circumstances. See *Malley*, slip op. 5; *id.* at 4-5 (Powell, J., concurring in part and dissenting in part).

The refinement of the broad standards set forth in the text of the Fourth Amendment by the decisions of this Court and the lower courts often provide even a reasonably well-trained officer with little more than general guidance in deciding how to exercise his judgment in carrying out his enforcement responsibilities in a manner consistent with constitutional requirements. Many of the decisions that a police officer must make on a daily basis, such as whether to stop and question a suspect, can only be resolved by applying general Fourth Amendment principles on a case-by-case basis to the particular facts at hand. See, *e.g.*, *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 10 ("[m]uch as a 'bright line' rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria"). Even a "reasonably competent officer" (*Malley*, slip op. 5) may find it difficult correctly to assess the facts in light of the governing law in the highly-charged situations that he must confront.

The legal standards discussed by the courts below—probable cause and exigent circumstances—well illustrate this point. "[P]robable cause," the Court has noted, "is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules" (*Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)). Whether a police officer has probable cause to make an arrest depends on "whether at that moment the facts and circumstances within [his] knowledge and of which [he] had reasonably trustworthy

information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense" (*Beck* v. *Ohio*, 379 U.S. 89, 91 (1964)). In addition, although the warrantless entry of a home is presumptively unlawful (see, *e.g.*, *United States* v. *Karo*, No. 83-850 (July 3, 1984), slip op. 8; *Payton* v. *New York*, 445 U.S. 573, 586 (1980)), it is also the case that "exigent circumstances" will justify an immediate entry to arrest a suspect (see, *e.g.*, *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); *Warden* v. *Hayden*, 387 U.S. 294, 298-299 (1967); see generally *Welsh* v. *Wisconsin*, 466 U.S. 740, 749-750 (1984)) and that, by definition, the question whether there are exigent circumstances in a given case cannot be answered without assessing the facts as they reasonably appeared to the responsible officer. This Court's decisions in *Santana* and *Hayden* found that an immediate entry was justified under the circumstances of each case, but did not provide a comprehensive test for measuring the existence of exigent circumstances. 427 U.S. at 42-43; 387 U.S. at 298-299. Similarly, the lower courts have recognized that there can be no bright-line answer to the question whether a warrantless entry to arrest a suspect is permissible and have developed different approaches to this question.[15] In sum, the question whether there are

[15] Several courts, including the Eighth Circuit, have followed the approach first set forth in *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc), "a leading federal case defining exigent circumstances" (*Welsh*, 466 U.S. at 751), which identified several factors (see App., *infra*, 14a-15a n.7, 24a n.3) to be considered in making this determination. See, *e.g.*, *United States* v. *Baldacchino*, 762 F.2d 170, 176-177 (1st Cir. 1985); *United States* v. *Martinez-Gonzalez*, 686 F.2d 93, 100-102 (2d Cir. 1982); *United States* v. *Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978); *United States* v. *Campbell*, 581 F.2d 22, 26 (2d Cir. 1978); *United States* v. *Shye*, 492 F.2d 886, 891-892 (6th Cir. 1974); *Salvador* v. *United States*, 505 F.2d 1348, 1351-1352 (8th Cir. 1974); *Vance* v. *North Carolina*, 432 F.2d 984, 990-991 (4th Cir. 1970). On other occasions, courts have cautioned against adopting a " 'checklist-type [of] analysis' " (*Llaguno* v. *Mingey*, 763 F.2d 1560,

exigent circumstances, like the question whether there is probable cause, cannot be resolved simply by virtue of the fact that a general standard exists. It is therefore hardly surprising that in such cases "[i]nadvertent errors of judgment" and "honest mistakes" will "inevitably occur given the pressures inherent in police work having to do with serious crimes." *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting).

Under the court of appeals' ruling, however, police officers are not free from the threat of liability and litigation unless they correctly assess how a court will resolve the merits of any Fourth Amendment question that may arise. Even if a police officer reasonably believes that his conduct is lawful under clearly established law—as petitioner believed here—his claim to qualified immunity will be defeated upon nothing more than a showing that he trespassed upon a general principle of law. That result is wholly unjustified. Denying a police officer the benefit of qualified immunity simply because a general standard such as probable cause or exigent circumstances is clearly established would put him in the "unhappy" dilemma of

---

1564 (7th Cir. 1985) (en banc)), but even then the courts have recognized that a bright-line rule is not possible. *Ibid.* ("[t]he operative word in the Fourth Amendment is 'unreasonable'; so the question ought to be, were the police unreasonable in not getting a warrant in the circumstances that confronted them?"). Compare LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. Mich. J.L. Ref. 417, 454-458 (1984). In still other situations, the courts have looked to the facts of the case at hand to determine whether an warrantless entry was "imperative" (*McDonald* v. *United States*, 335 U.S. 451, 456 (1948)). See, *e.g.*, *United States* v. *Manfredi*, 722 F.2d 519, 522 (9th Cir. 1983); *United States* v. *Hultgren*, 713 F.2d 79 (5th Cir. 1983); *United States* v. *Titus*, 445 F.2d 577, 578-579 (2d Cir.), cert. denied, 404 U.S. 957 (1971).

"choos[ing] between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson*, 386 U.S. at 555.

Nor can it be said that petitioner's conduct in this case was so obviously unlawful that an examination of the facts known by him to be true was unnecessary. Petitioner clearly had probable cause to believe that Vadaain Dixon was responsible for the bank robbery. Dixon had a history of armed robbery and had pleaded guilty to four armed bank robberies only one month earlier; he fit the bank tellers' description of the robber, and two tellers had positively identified him from a photo display. The district court's finding in this regard (App., *infra*, 23a) was not disturbed by the court of appeals. Moreover, the district court also found that petitioner had probable cause to believe that Vadaain Dixon was at the Creightons' home. *Ibid.*[16] Petitioner had been told by Vadaain Dixon's probation officer that Dixon and his wife Cheryl had both admitted that she was living at the Creightons' home and that Cheryl had been using their car on a daily basis to pick up her husband at the halfway house and take him to the

---

[16] Although the court of appeals ruled that there was a factual dispute on this issue (App., *infra*, at 7a-12a), that court's ruling in this regard was in error. Whether there is probable cause turns on the facts reasonably believed by an officer at the time of the arrest, even if those facts may turn out in part to be wrong. See, *e.g.*, *Illinois* v. *Gates*, 462 U.S. at 231-235, 245 n.14; *Franks* v. *Delaware*, 438 U.S. 154, 165 (1978); *Hill* v. *California*, 401 U.S. 797, 803-804 (1971); 1 W. LaFave, *Search and Seizure* § 3.2, at 466 (1978). Accordingly, the court of appeals' reliance on facts that were not known to petitioner at the time of his entry, such as the newspaper report the following day or the conversation between one of the local police officers and respondent's neighbor (App., *infra*, 9a), were immaterial, as the district court ruled (*id.* at 25a n.5).

Creightons' home. Furthermore, the description of the getaway car, even if not precisely identical to the Creightons' car, was a legitimate factor for petitioner to consider, particularly when coupled with Vadaain and Cheryl Dixons' statements as to her whereabouts. Finally, relying on the factors previously applied by the Eighth Circuit in *United States* v. *Kulcsar,* 586 F.2d 1283, 1287 (1978), the district court ruled that there were exigent circumstances that justified petitioner's warrantless entry. App., *infra,* 23a-24a. The district court's ruling that petitioner's conduct did not violate the Fourth Amendment is entitled to substantial weight on the qualified immunity issue.

2. The lower courts are in disarray as to the correct approach to the resolution of a qualified immunity claim. Contrary to the court below, several other courts of appeals have held that the inquiry under *Harlow* does not end with the finding that a general principle of law was well-established, but continues until the court determines whether, in the circumstances of the case, the defendant should have known that his own conduct was unlawful. For example, in *Floyd* v. *Farrell,* 765 F.2d 1, 5 (1st Cir. 1985), the court held that "a police officer should not be found liable under [42 U.S.C.] § 1983 for a warrantless arrest because the presence of probable cause was merely questionable at the time of the arrest" (*id.* at 5) and that "so long as the presence of probable cause is at least arguable," the officer is entitled to immunity (*ibid.*). In resolving that inquiry, the court held, "the question we must ask is whether another officer, standing in [the defendant's] shoes and having the same information [the defendant] had, would reasonably have come to the conclusion that he had probable cause to arrest [the suspect]" (*ibid.*). Similarly, in *Briggs* v. *Malley,* 748 F.2d 715, 719 (1st Cir. 1984), aff'd, No. 84-1586 (Mar. 5, 1986), which

concerned a police officer's liability for obtaining an arrest warrant, the court expressly held that the qualified immunity issue must be resolved by reference to the facts known by the officer. As the court held, "*only* where an officer is 'constitutionally negligent,' that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, will liability attach. Where the sufficiency of the facts fall into the grey area appropriate for judicial determination, submission of the affidavit to a magistrate will insulate the officer from liability." 748 F.2d at 721 (emphasis in original). See also *Hobson* v. *Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, No. 84-1139 (Mar. 25, 1985) (emphasis in original) (recognizing that an interpretation of *Harlow* requiring only that broadly defined rights be clearly established "would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that *their* conduct is problematic").[17]

---

[17] See also, *e.g.*, *LeSavage* v. *White*, 755 F.2d 814, 821 (11th Cir. 1985) ("[t]he question of qualified immunity under *Harlow* is one of reasonableness – would a reasonable person in [the defendant's] shoes have known he was violating [the plaintiff's] constitutional rights?"); *Zook* v. *Brown*, 748 F.2d 1161, 1165 (7th Cir. 1984) (defendants were entitled to qualified immunity for disciplining of a public officer for endorsing a local ambulance service since the application of the First Amendment to the particular facts of the case was unclear); *Evers* v. *County of Custer*, 745 F.2d 1196, 1203 (9th Cir. 1984) (individual defendants entitled to qualified immunity for declaring that a certain road, claimed by a private party to be her property, was public, because it was not clear that due process required notice and a hearing before a declaration that a road is public can issue); *Bailey* v. *Turner*, 736 F.2d 963, 969-972 (4th Cir. 1984) (prison guard entitled to a jury instruction on qualified immunity in connection with his use of mace on a prisoner because there was no per se rule forbidding its use); *O'Hagan* v. *Soto*, 725 F.2d 878, 879 (2d Cir. 1984) (police officer entitled to qualified immunity for questioning a suspect in the absence of counsel because it was not clearly established whether the suspect had a Sixth Amendment right to counsel at the time of the questioning).

By contrast, other courts have rejected an immunity claim on the ground that the legal standard was clearly established, without determining whether the application of that standard to the particular facts of the case was also clear. See *Bass* v. *Wallenstein*, 769 F.2d 1173, 1186 (7th Cir. 1985) (holding that defendants were not entitled to immunity because the Eighth Amendment standard of "deliberate indifference to inmates' serious medical needs" was clearly established at the pertinent time); *Fujiwara* v. *Clark*, 703 F.2d 357, 361 (9th Cir. 1983) (denying qualified immunity because "[t]he law governing the conduct of Appellees was then clearly established"); see also *Trejo* v. *Perez*, 693 F.2d 482, 488 n.10 (5th Cir. 1982) (emphasis in original) (stating that "[t]he Fourth Amendment rule on warrantless arrests *is* 'clearly established law.' If an arrest lacks probable cause for its support, it is, objectively speaking, in violation of clearly established law."). This confusion among the circuits warrants resolution by this Court.[18]

[18] As noted above, this question was presented in *Whitley* v. *Albers*, slip op. 15, but the Court did not reach it.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
PAUL J. LARKIN, JR.
Assistant to the Solicitor General
BARBARA L. HERWIG
RICHARD A. OLDERMAN
Attorneys

MARCH 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5150

ROBERT E. CREIGHTON, JR. AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, APPELLANTS,

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS, RUSSELL ANDERSON, APPELLEE.

JOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Submitted: February 12, 1985

Filed: July 12, 1985

Before LAY, Chief Judge, and HEANEY and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

The issue in this appeal is whether the district court erred in granting Federal Bureau of Investigation Agent Russell Anderson's motion for summary judgment on the

Creightons' claim that Anderson's warrantless search of their home at night violated their rights under the fourth amendment to the United States Constitution. For the reasons set forth below, we reverse and remand.

I. FACTS.

Because this case was dismissed on Anderson's motion for summary judgment, we set out the facts in the light most favorable to the Creightons and draw all inferences from the underlying facts in their favor.[1] *Adickes* v. *Kress & Co.*, 398 U.S. 144, 158-59 (1970). On the night of November 11, 1983, Sarisse and Robert Creighton and their three young daughters were spending a quiet evening at their home when a spotlight suddenly flashed through their front window. Mr. Creighton opened the door and was confronted by several uniformed and plain clothes officers, many of them brandishing shotguns. All of the officers were white; the Creightons are black. Mr. Creighton claims that none of the officers responded when he asked what they wanted. Instead, by his account (as verified by a St. Paul police report), one of the officers told him to "keep his hands in sight" while the other officers rushed through the door. When Mr. Creighton asked if they had a search warrant, one of the officers told him, "We don't have a search warrant [and] don't need [one]; you watch too much TV."

Mr. Creighton asked the officers to put their guns away because his children were frightened, but the officers refused. Mrs. Creighton awoke to the shrieking of her children, and was confronted by an officer who pointed a shotgun at her. She allegedly observed the officers yelling at her three daughters to "sit their damn asses down and

---

[1] In compliance with Fed. R. Civ. P. 56(e), the Creightons opposed Anderson's affidavits and exhibits with several affidavits and exhibits. The Creightons also filed an offer of proof alleging what they could prove through limited discovery.

stop screaming." She asked the officer, "What the hell is going on?" The officer allegedly did not explain the situation and simply said to her, "Why don't you make your damn kids sit on the couch and make them shut up."

One of the officers asked Mr. Creighton if he had a red and silver car. As Mr. Creighton led the officers downstairs to his garage, where his maroon Oldsmobile was parked, one of the officers punched him in the face, knocking him to the ground, and causing him to bleed from the mouth and forehead. Mr. Creighton alleges that he was attempting to move past the officer to open the garage door when the officer panicked and hit him. The officer claims that Mr. Creighton attempted to grab his shotgun, even though Mr. Creighton was not a suspect in any crime and had no contraband in his home or on his person. Shaunda, the Creighton's ten-year-old daughter, witnessed the assault and screamed for her mother to come help. She claims that one of the officers then hit her.

Mrs. Creighton phoned her mother, but an officer allegedly kicked and grabbed the phone and told her to "hang up that damn phone." She told her children to run to their neighbor's house for safety. The children ran out and a plain clothes officer chased them. The Creightons' neighbor allegedly told Mrs. Creighton that the officer ran into her house and grabbed Shaunda by the shoulders and shook her. The neighbor allegedly told the officer, "Can't you see she's in shock; leave her alone and get out of my house." Mrs. Creighton's mother later brought Shaunda to the emergency room at Children's Hospital for an arm injury caused by the officer's rough handling.

During the melee, family members and friends began arriving at the Creightons' home. Mrs. Creighton claims that she was embarrassed in front of her family and friends by the invasion of their home and their rough treatment as if they were suspects in a major crime. At this time, she again asked Anderson for a search warrant. He allegedly replied, "I don't need a damn search warrant when I'm looking for a fugitive." The officers did not discover the

allegedly unspecified "fugitive" at the Creightons' home or any evidence whatsoever that he had been there or that the Creightons were involved in any type of criminal activity. Nonetheless, the officers then arrested and handcuffed Mr. Creighton for obstruction of justice and brought him to the police station where he was jailed overnight, then released without being charged.

The Creightons claim that it was not until during or shortly after the melee that they learned the officers were looking for Vadaain Dixon, Mrs. Creighton's brother, who, unbeknownst to the Creightons, was a suspect in an armed robbery committed several hours earlier that afternoon. They learned that the officers, before arriving at the Creightons' home, had made warrantless searches of the home of Iris Dixon, the mother of Vadaain Dixon and Mrs. Creighton, and the home of Minnie Dixon, the grandmother of Vadaain Dixon and Mrs. Creighton. Anderson claims that he had probable cause to search the homes of Vadaain Dixon's relatives, that it would have been too difficult to get a search warrant because it was nighttime on Veteran's Day, and that he believed that exigent circumstances justified the searches without a search warrant.

The Creightons, individually and on behalf of their children, Shaunda and Tiffany Creighton, then brought this action for compensatory and punitive damages against the City of St. Paul, six St. Paul police officers, FBI agent Russell Anderson, and others unknown to them. The Creightons alleged causes of action under the fourth amendment to the United States Constitution pursuant to *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), under 42 U.S.C. §§ 1983 and 1985, and under the tort theories of intentional infliction of emotional distress, assault and battery, false arrest and imprisonment, and negligence. The Creightons brought their action in state court, but it was removed to federal court pursuant to defendant Anderson's petition under 28 U.S.C. §§ 1346 and 1442.

Anderson failed to file an answer, but moved for summary judgment. The district court granted the motion[2] on the theory that Anderson was entitled to qualified immunity under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982) because, in substance, his warrantless search of the Creightons' home was reasonable.[3]

II. DISCUSSION.

A. Introduction.

Recently, in *Welsh* v. *Wisconsin,* ____ U.S. ____, 52 U.S.L.W. 4581 (1984), the Supreme Court reiterated:

> It is axiomatic that "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." * * * And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. * * * It is not surprising, therefore, that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton* v. *New York,* 445 U.S., at 586. See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 474-475 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show . . . the presence of 'exigent circumstances' "). * * *

---

[2] The district court also granted the motion of the remaining defendants to remand to state court. The Creightons do not appeal from this order.

[3] The court set forth additional reasons for summary judgment on the Creightons' sections 1983 and 1985 claims against Anderson, and also dismissed the Creightons' state law tort claims against Anderson. Because the Creightons do not appeal from these holdings, we affirm the district court's dismissal of these claims.

> Consistently with these long-recognized principles, the Court decided in *Payton* v. *New York, supra,* that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. *Id.*, at 583-590. At the same time, the Court declined to consider the scope of any exception for exigent circumstances that might justify warrantless home arrests, *id.*, at 583, thereby leaving to the lower courts the initial application of the exigent-circumstances exception. Prior decisions of this Court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," * * *, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the Court has recognized only a few such emergency conditions[.]

Id. at 4584 (citations and footnotes omitted).

The Creightons contend that the trial court committed three errors in granting Anderson's motion for summary judgment. They argue, first, that the court erred in finding as a matter of law that Anderson had probable cause to believe that Vadaain Dixon was in the Creightons' home at the time of the search and that exigent circumstances justified the lack of a warrant; second, that the court erred in applying the law of summary judgment by failing to draw all inferences in favor of the nonmoving party and by granting summary judgment when there were disputed issues of material fact; and third, that the court erred in granting summary judgment before discovery due to a misapplication of *Harlow* v. *Fitzgerald,* 452 U.S. 800 (1982). After reviewing the affidavits and exhibits of both parties in the light most favorable to the Creightons, we agree that Anderson was not entitled to summary judgment because he has not proved "with such clarity as to leave no room for controversy," *Nix* v. *Sweeney,* 573 F.2d

998, 1001 (8th Cir. 1978), *cert. denied,* 444 U.S. 929 (1979), that he had probable cause to believe Vadaain Dixon was in the Creightons' home and that exigent circumstances justified his search without a warrant. The record reveals numerous unresolved factual controversies on the issues of probable cause and exigent circumstances which should be resolved by the jury[4] after the Creightons have been given the opportunity for reasonable discovery.

B. There is an unresolved factual controversy over whether Anderson had probable cause to believe Vadaain Dixon was in the Creighton's home on the night of November 11, 1983.

In *Nix* v. *Sweeney,* 573 F.2d at 1001, we held that:

> In order to prevail on summary judgment [on the issue of probable cause], the evidence, including admitted facts and disputed facts viewed in the light most favorable to the plaintiff, in the knowledge of the police officer ordering the arrest [or search], *must conclusively establish probable cause.* * * * *Conflicting evidence on any issue would make that issue a jury question.* [Emphasis added.]

As we stated in *United States* v. *Taylor,* 428 F.2d 515, 517 (8th Cir.), *cert. denied,* 400 U.S. 956 (1970):

> probable cause to search exists when the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that the property to be seized [or subject of the arrest warrant] *will* be found in a particular place or on a particular person. [Emphasis added.]

---

[4] We reject the government's claim that the Creightons waived their right to a jury trial because their motion for jury trial was filed twelve days after the government filed its summary judgment motion.

A mere suspicion that a suspect *might* be in the home of a third party generally will not establish probable cause to search the third party's home. *Steagald* v. *United States,* 451 U.S. 204, 214-15 (1981); *Rice* v. *Wolff,* 513 F.2d 1280, 1293 (8th Cir. 1975), *rev'd on other grounds sub nom. Stone* v. *Powell,* 428 U.S. 465 (1976) (In response to claim that there was probable cause to believe a suspect was in the searched home on a particular day because he had been known to visit the home in the past, the Court held: "Clearly, such speculation is not a reasonable ground justifying the invasion of citizens' privacy.").

The district court determined that the following information gave Anderson probable cause to believe Vadaain Dixon was at the Creightons' home. On the day before the robbery, Probation Officer William Johnson had told Anderson that Cheryl Dixon, Vadaain's wife, told him on November 1st that she was living at the Creightons' and was using their automobile. Vadaain Dixon also told Johnson, on November 1st, that Cheryl was living with the Creightons and that she picked him up by automobile so that they could spend his day furloughs from a halfway house together. Anderson knew Cheryl Dixon had been arrested for acting as Vadaain's accomplice on prior robberies. Finally, Anderson was allegedly informed by Jamie Dixon, Iris Dixon's son, that the Creightons owned a red or burgundy Oldsmobile, a car allegedly matching the description of the car used in the robbery. This was confirmed by computer shortly before or after Anderson spoke with Jamie Dixon.

We agree with the Creightons that these allegations did not justify summary judgment on the probable cause question because there are several issues for the jury on whether these "facts" would have led an officer of reasonable caution to believe that Vadaain Dixon was in the Creightons' home at the time of the search. First, the pleadings, affidavits and exhibits submitted by the

Creightons raise an issue of fact as to whether their automobile matched the description of the car used in the robbery. Anderson's affidavit claims: "I also learned from St. Paul police officers who had interviewed witnesses from the neighborhood that the robber had escaped in a car described as a burgundy or maroon over silver car, possibly a Buick. Other witnesses said it was possibly a darker color." Although this description is ambiguous, if factual inferences are to be drawn in the Creightons' favor, it seems to us that Anderson describes a two-tone red *and* silver car such as the red over silver Buick Riviera. The Creightons own a solid maroon Oldsmobile. It is far from clear and, thus, an issue for the jury, whether the description of a two-tone red-and-silver car, possibly a Buick, is a match with a solid maroon Oldsmobile. In any event, the ambiguous description of the car – if it could be considered a match with the Creightons' car – probably describes a significant portion of all the cars in St. Paul, Minnesota.

Additionally, the Creightons sought, but were denied, discovery on two factual issues which might shed light on the description of the car. First, they contend that a St. Paul newspaper reported that the FBI stated that no car had been seen leaving the bank robbery on November 11, 1983. Second, they contend that the police, shortly after arriving at their home, asked their neighbor about a red *and* silver car with a *yellow* license plate. The Creightons' car apparently had white-and-blue Minnesota plates. Thus, upon further discovery and trial on the facts, the Creightons might show that Anderson either had no description of a getaway car or that if he did, it was a description of a two-tone red-and-silver Buick with yellow license plates. This would not justify a search of the Creightons' home because this description does not match their solid maroon Oldsmobile with white-and-blue plates. Given that Anderson's summary judgment memorandum

claims that the "most important [evidence establishing probable cause] is the fact that the robbery car strongly resembled one owned by the Creightons," the dispute over the identification of the car calls for further factfinding and resolution by the jury.

The second basis for Anderson's alleged probable cause determination was that:

> I knew from my investigations of previous bank robberies committed by Vadaain Dixon that Sarisse Creighton was Vadaain Dixon's sister. I also knew that Cheryl Ann Donlin Dixon, Vadaain Dixon's wife, had resided with Robert and Sarisse Creighton from May of 1983, after her arrest in Dallas for the Omaha bank robbery, to November 9, 1983, the day Vadaain Dixon jumped his bond. I also knew that Vadaain Dixon has stayed on a daily basis at the house of Robert and Sarisse Creighton with Cheryl Ann Donlin Dixon during his four-hour furloughs from the Volunteers of America residence from October 13 to approximately November 9, 1983.

Before discussing the Creightons' arguments that these claims are untrue and based on unreliable double hearsay, we note their point that defendant Anderson was informed of all these "facts" on November 10, 1983, the day before the search, and one day after Anderson learned that Vadaain Dixon had failed to return to the Volunteers of America halfway house. Because the government bases its argument regarding probable cause and exigent circumstances on these alleged "facts" and on how Vadaain Dixon was a dangerous fugitive, a serious question is raised why these facts did not lead Anderson to obtain a warrant for a search—preferably in the daytime—of the Creightons' home on November 10, 1984.

Recognizing the force of this argument, the government concedes that these alleged "facts" did not establish probable cause that Vadaain Dixon might be at the

Creightons' home. However, they contend that these suspicions amount to probable cause when considered in conjunction with the alleged match of the Creightons' car with the alleged getaway car. We have already discussed the need for more factfinding on the car identification dispute; here, we note that there is substantial force in the Creightons' attack on Anderson's claim that Vadaain Dixon might be at the Creightons because Cheryl Dixon allegedly had lived with the Creightons in the several months preceding the robbery.

First, Sarisse and Robert Creighton's sworn affidavits claim that although Cheryl Dixon had lived with them for two weeks in the summer of 1983, she had not resided at their home at any time thereafter. They also have included in the summary judgment exhibits all of Vadaain Dixon's furlough cards from the Volunteers of America halfway house which contradict Anderson's claim that Vadaain had visited the Creightons on a daily[5] basis from October 13 to November 9, 1983, and support the claim that Cheryl Dixon was not living with the Creightons.

Second, the Creightons claim that Anderson's information is unreliable double hearsay. Anderson alleges that he obtained the information on November 10, 1983, from Federal Parole Officer William Johnson who allegedly obtained it ten days earlier when Vadaain and Cheryl Dixon

---

[5] The record contains twenty-seven furlough cards filled out by Vadaain Dixon from October 13, 1983 to November 9, 1983. On October 15, 1983, Vadaain Dixon listed as destinations for his four-hour leave: 1) Iris Dixon; 2) Cheryl Dixon at Creightons; and 3) Janice Robertson. On October 17, 1983, Vadaain listed: 1) Har-Mar Mall; 2) Iris Dixon; 3) Cheryl Dixon at the Creightons; and 4) McDonalds. On October 18, 1983, Vadaain listed: 1) Iris Dixon; and 2) Cheryl Dixon at the Creightons. The Creightons' address is not noted as a possible destination on any of the remaining twenty-four furlough cards. Thus, even if Cheryl Dixon had visited the Creightons for three days and Vadaain had briefly visited her there, Vadaain Dixon's furlough cards show that he had not been at the Creightons for over three weeks prior to the robbery.

allegedly told him that Cheryl was living at the Creightons and occasionally using their car. The Creightons note that even the government admits that Cheryl and Vadaain Dixon are totally untrustworthy and unreliable. They argue it is not implausible the Dixons would have lied to their parole officer that Cheryl was living with a respectable family and attending a nearby beautician's school. This raises an issue for the jury because "if hearsay declarations are used to establish probable cause, the [officer must show that he had] a 'substantial basis' for crediting the hearsay declarations." *People* v. *Love,* 37 CrL 2200, 2201 (Cal. Ct. App. 1985) (citing *Jones* v. *United States,* 362 U.S. 257, 270 (1960); *United States* v. *Ventresca,* 380 U.S. 102, 109 (1965)).

Third, even if Anderson was justified in relying on the information he obtained from Johnson, Anderson is unreasonable in claiming that it showed that Cheryl Dixon was living at the Creightons up to November 9. At best, his information suggested that Cheryl Dixon might have been living at the Creightons' home up to November 1. Moreover, even if one assumes that Cheryl Dixon was living at the Creightons' up to November 9, this does not necessarily show that Vadaain Dixon would have been at the Creightons' on November 11.

In sum, there are significant factual disputes about the truthfulness and quality of the "facts" behind Anderson's alleged probable cause determination. Summary judgment on this issue was unjustified because the government did not "conclusively establish probable cause." *Nix,* 573 F.2d at 1001.

C. There is a question of fact whether exigent circumstances justified Anderson's lack of a search warrant.

The trial court accepted Anderson's three claims why exigent circumstances justified his warrantless search of the Creightons' home. First, the court found that Anderson was in "hot pursuit" of a suspect. This was error because

the evidence does not establish "hot pursuit" as a matter of law.[6] Recently in *Welsh* v. *Wisconsin*, ____ U.S. ____, 52 U.S.L.W. at 4585, the Court held that the police were not in "hot pursuit" of a suspect "because there was no immediate or continuous pursuit of the [petitioner] from the scene of a crime." *See also United States* v. *Morgan*, 743 F.2d 1158 (6th Cir. 1984) (Court upholds motion to suppress evidence, rejecting "hot pursuit" exception because, although the officers followed the suspect from the scene of a crime, they stopped at a coffee shop for approximately twenty minutes to plan the arrest). In *United States* v. *Santana*, 427 U.S. 38, 43 (1976), the Court held that " 'hot pursuit' means some sort of a chase." In the case at hand, no evidence in the record supports a claim that Anderson was in "immediate or continuous pursuit" of Vadaain Dixon or that Anderson was involved in "some sort of a chase." Rather, Anderson had not seen Dixon's getaway car and had, at best, minimal evidence that Dixon might have fled to the Creightons' home. Anderson cites no case which supports a holding as a matter of law that there was "hot pursuit" on facts similar to the case at hand. This issue should be resolved by the jury under proper instructions from the court on the limited situations where "hot pursuit" may be found.

Second, the trial court suggested that, as a matter of law, the possibility of destruction of evidence justified Anderson's lack of a warrant. For this exception to apply, the officer must show that he had some actual and

---

[6] We reject Anderson's argument that the Creightons' appeal "should be dismissed because they have not briefed an independent ground for the trial court's ruling, i.e., [that] * * * Anderson was in hot pursuit of an armed and dangerous felon." The Creightons, by arguing that exigent circumstances did not justify the lack of a warrant, have sufficiently raised the point that Anderson was not in "hot pursuit" of a suspect. *See Terry* v. *Ohio*, 392 U.S. 1, 20 (1968) (referring to "hot pursuit" as an example of an exigent circumstance); *Dorman* v. *United States*, 435 F.2d 385, 391 (D.C. Cir. 1970) (en banc) (same).

reasonable basis for believing that evidence would be destroyed. *United States* v. *Perez,* 700 F.2d 1232, 1237 (8th Cir.), *cert. denied,* 104 S. Ct. 3587 (1983) ("We have more recently stated that '[t]o justify a warrantless entry based on imminent destruction of evidence, factual circumstances must demonstrate a sufficient basis for an officer to believe somebody in the residence will likely destroy evidence. * * * *Mere fear or apprehension will not justify a warrantless entry of a private home.*' " [Emphasis added and citation omitted.]); *United States* v. *Kulcsar,* 586 F.2d 1283 (8th Cir. 1978); *United States* v. *Moreno,* 701 F.2d 815, 818 (9th Cir. 1983) (Because the possibility of destruction of evidence exists in every case, there must be some evidence to support the suspicion if the lack of a search warrant is to be excused.) As the Creightons point out, Anderson's affidavit does not mention that he feared that evidence would be destroyed. The *post hoc* speculations of Anderson's counsel that Dixon might have destroyed evidence if he had been in the Creightons' home apparently were not factors in Anderson's decision to conduct the search. Moreover, there is no evidence to support the speculation. Accordingly, the trial court erred in finding that the possibility of "destruction of evidence" justified the lack of a warrant. This issue should be resolved by the jury upon proper instructions from the court.

Finally, the trial court found that exigent circumstances existed under the six factor analysis set forth in *Dorman* v. *United States,* 435 F.2d 385 (D.C. Cir. 1970).[7] *See also,*

---

[7] These factors are:

(1) That a grave offense is involved, particularly a crime of violence;

(2) the suspect is reasonably believed to be armed;

(3) a clear showing of probable cause;

(4) a strong reason to believe that the suspect is in the dwelling;

(5) the likelihood of escape if not swifty apprehended;

e.g., United States v. *Kulcsar,* 586 F.2d 1283, 1287 (8th Cir. 1978). We agree with the Creightons that this was error because there is a factual dispute for the jury's resolution on whether exigent circumstances existed under the *Dorman* analysis. It is for the jury to decide whether Anderson had a "strong reason" to believe that Vadaain Dixon was in the Creightons' home at the time of the search, and whether there was a likelihood of Dixon's escape if the search was delayed until a warrant was obtained. *See Wallace* v. *King,* 626 F.2d 1157, 1161 (4th Cir. 1980), *cert. denied,* 451 U.S. 969 (1981); *United States* v. *Glover,* 555 F. Supp. 604 (D. D.C. 1982), *affirmed,* 725 F.2d 120 (D.C. Cir.), *cert. denied,* 104 S. Ct. 1682 (1984). There is also a disputed issue of fact for the jury on whether Anderson's entry was peaceable. If the Creightons can prove that the officers did not ask for permission to enter and did not explain their mission but simply told Mr. Creighton to "keep his hands in sight" while they entered his home with guns ready, then, on the facts of this case, the jury, could find that the entry was not peaceable.

In sum, we believe that this case calls for additional fact-finding on whether exigent circumstances justified Anderson's lack of a warrant.

III. QUALIFIED IMMUNITY.

Because we have decided that there is a jury question on whether Anderson violated the Creightons' fourth amendment rights, we must reach the question whether Anderson is nonetheless immune from damages under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982).[8]

---

(6) a peaceable entry as opposed to a "breaking;" and

(7) the time of entry (night or day).

Dorman, 435 F.2d at 392-93.

[8] Although the trial court believed that it was deciding the *Harlow* issue, it only addressed the question of whether Anderson violated the constitution and never really reached the immunity issue.

In *Harlow*, the Supreme Court held that "government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Anderson argues that, under *Harlow,* he is entitled to immunity from damages if his conduct was "objectively reasonable." However, this misstates the standard. *Harlow* does not give courts unguided discretion to determine what conduct is or is not objectively reasonable. Instead, the *Harlow* Court stated that the first inquiry of the qualified immunity analysis is whether, assuming that the government defendant violated plaintiffs' constitutional or statutory rights as they are presently defined, did the defendant's conduct "violate *clearly established* statutory or constitutional rights of which a reasonable person would have known" of at the time of the alleged violation? 457 U.S. at 818 (emphasis added). The Court then stated that "if the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19.

Anderson admits he knew that he could not search for Vadaain Dixon in the Creightors' home unless he had probable cause to believe that Dixon was in the Creightons' home and that "exigent circumstances" justified his failure to obtain a warrant. He argues, however, that the meaning of "exigent circumstances" was not clearly established on November 12, 1983. We disagree.

In our previous discussion, we set forth a few of the numerous cases detailing the "few * * * emergency conditions," *Welsh,* 52 U.S.L.W. at 4584, which will justify a warrantless search of a home. We find that the Creightons' fourth amendment rights and the "exigent circumstances" doctrine were "clearly established" on November 11, 1983.

Anderson has cited no persuasive reason why he could reasonably have been unaware of this clearly established law.

Reversed and remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-162

ROBERT E. CREIGHTON, JR., AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, PLAINTIFFS.

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS, RUSSELL ANDERSON, ANDJOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US, DEFENDANTS.

[July 16, 1984]

MEMORANDUM OPINION AND ORDER

Plaintiffs, Robert E. Creighton, Jr., and Sarisse Creighton, husband and wife, individually and on behalf of their children, Shaunda and Tiffany Creighton, brought this action for compensatory and punitive damages against the City of St. Paul, six police officers (Officers John DeNoma, Daniels, Ashton, Galeo, Snyder, and Steffan), Federal Bureau of Investigation (F.B.I.) agent Russell Anderson, and others unknown to them. Plaintiffs allege causes of action under 42 U.S.C. §§ 1983 and 1985, the constitution pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,*

403 U.S. 388 (1971), and under the tort theories of intentional infliction of emotional distress, assault and battery, false arrest and imprisonment, and negligence. This action was originally brought by plaintiffs in state court, but was removed to this court by defendant Anderson pursuant to 28 U.S.C. §§ 1346 and 1442. This matter is now before the court upon Anderson's motion to dismiss or for summary judgment and the remaining defendant's motion to remand to state court.

BACKGROUND

On Friday, November 11, 1983, Minnesota Federal Savings and loan on Grand Avenue in St. Paul was robbed by an armed bandit at approximately 3:30 in the afternoon. November 11 was Veteran's Day, a legal holiday on which federal courts and the prosecutors office were closed. Defendant Anderson of the F.B.I. was called and began immediately to investigate the robbery. A description of the robber was obtained from those at the scene. From interviews with others in the neighborhood, police officers obtained a description of the getaway car as burgundy or maroon over silver, possibly a Buick. Others said it was possibly a darker color.

Anderson states he suspected that the robber was Vadaain David Dixon by 6:30 p.m. that day.[1] Anderson was familiar with Vadaain Dixon because he had investigated several other bank robberies committed by Dixon. The description given at the bank matched Dixon in numerous respects—height, weight, build, race, hair, complexion. Anderson also knew that Dixon had jumped bond two days before and that there was an outstanding federal warrent for his arrest. On October 13, 1983, a federal judge released Dixon on bond after he pled guilty

[1] Several days later an accomplice to the robbery, Jeffrey Lynn Barge, was arrested and gave a statement naming Vadaain Dixon as the robber.

to a bank robbery charge and ordered him to reside at the Volunteers of America residence. Dixon stayed at the residence, taking day furloughs, until November 9, 1983, when he failed to return from a day furlough.

To check out his suspicion, Anderson arranged for a photo lineup. The two tellers who had seen the robber each were asked to examine a lineup of six photos at the St. Paul Police Department. Both tellers selected Dixon. The identification was made about 8:00 p.m. on the day of the robbery.

Anderson and defendant Sergeant Galeo of the St. Paul Police Department then pooled their knowledge of Dixon. They knew of a robbery in which Dixon's accomplice pistol-whipped store employees and customers and in which Dixon attempted to run over police officers in a high speed chase. They knew Dixon had admitted using a pistol in previous bank robberies. They also knew of Dixon's family and family connections with his previous crimes: Dixon's wife, Cheryl Dixon, had been his accomplice in previous robberies and had been arrested therefor: his brother Jamie had driven Cheryl and Vadaain to Milwaukee after a previous robbery.

Jamie was supposedly residing at the residence of his mother, Iris Dixon, where the officers then proceeded.[2] The officers arrived at Iris Dixon's between 8:15 and 8:30 p.m. Jamie was there and, at the officers' request, provided a list of siblings with a description of the automobiles they owned. Sarisse Creighton, Vadaain's sister and plaintiff herein, was listed and her automobile described as a red or burgundy Oldsmobile Cutlass.

From his investigations of previous robberies by Vadaain Dixon, Anderson knew Sarisse was Vadaain's sister. He had also been informed that Vadaain's wife

---

[2] Of the three houses the officers went to that night, Iris Dixon's, Minnie Dixon's, and the Creightons, Iris Dixon's house was the closest to the St. Paul Police station and to the bank which was robbed.

Cheryl had been residing with the Creightons and that Vadaain had stayed on a daily basis at the Creightons' during his day furloughs from Volunteers of America. See affidavits of Probation Officer William Johnson, ¶¶ 5, 6, and of Russell Anderson, ¶ 12. The officers meanwhile confirmed by computer that the Creightons' owned a maroon or burgundy Oldsomobile Cutlass.

Jamie Dixon also told the officers that Vadaain might be at his grandmother Minnie Dixon's. Minnie Dixon's house was on the way to Creightons' and the officers stopped there at approximately 8:30 p.m. Minnie stated that she had not seen Vadaain.

The officers then left and went to Creightons', arriving at approximately 8:40 p.m. Anderson, Galeo, and DeNoma went to Creightons' front door; DeNoma was in full uniform. The Creightons state DeNoma had a shotgun. When Robert Creighton answered the door, Anderson alleges that DeNoma identified the officers, informed Robert Creighton of the robbery and that they had a warrant to arrest Vadaain. They then entered the home. Anderson alleges that DeNoma and Anderson explained in detail the events of the robbery to Creighton upon entrance and that Creighton did not indicate Vadaain was not there nor did he tell the officers to leave.

Robert Creighton argues that he immediately objected to the officers entering his home without a warrant. He also insists that no one gave any explanation for the entrance and search.

It is undisputed that Sarisse Creighton became very upset and loud when she saw the officers; Anderson's memorandum states she "went berserk" She claims her children were crying and a shotgun was pointed at her. She yelled at her children to run and they were brought back to the house by the officers. Plaintiffs allege one child went to the hospital that night for an arm injury.

It is also undisputed that Robert Creighton was struck in the face by officer DeNoma. Anderson's memorandum states Creighton attempted to grab DeNoma's shotgun and, after three warnings, DeNoma struck him a "single blocking punch in the mouth". Robert Creighton argues that he made no such move to take DeNoma's gun, but was struck in the mouth. Robert Creighton was arrested but ultimately released without being charged. There is no suggestion or allegation that Anderson was involved in any of the alleged violent acts.

DISCUSSION

In passing upon a motion for summary judgment, the court is required to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences from the underlying facts disclosed in pleadings and affidavits. *Ralph's Distributing Co.* v. *AMF, Inc.*, 667 F.2d 670 (8th Cir. 1981); *Vette Co.* v. *Aetna Casualty & Surety Co.*, 612 F.2d 1076 (8th Cir. 1980). Thus, Anderson must establish his right to judgment as a matter of law; there must be no genuine issue of fact and no room for doubt or controversy.

The key question on this motion is whether Anderson is entitled to qualified immunity pursuant to *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Supreme Court stated:

> [G]overnment officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id., at 818. This objective reasonableness standard is meant to prevent excessive disruption of government and permit resolution of many insubstantial claims on summary judgment without discovery. *Id.*

Based on the undisputed facts and circumstances of this case, Anderson is entitled to qualified immunity pursuant to *Harlow*. Anderson did not violate any clearly established rights of which a reasonable person would have known because he was justified in suspecting Vadaain Dixon was the robber, he had probable cause to believe Vadaain Dixon was in the Creightons' home and exigent circumstances justified search of the Creightons' home without a warrant.

Anderson's conclusion that Vadaain Dixon was the prime suspect was reasonable and justified in light of the description of the robber given by witnesses, Dixon's past robberies and his recent fugitive status, and the selection of Dixon's photo from a photo lineup by the two tellers.

Anderson had probable cause to believe Vadaain Dixon was at the Creighton home for a number of reasons. Probation Officer William Johnson had informed Anderson that Cheryl Dixon, Vadaain's wife, told him she was residing at the Creightons' and that she was using the Creightons' automobile and Iris Dixon's for transportation. Vadaain Dixon also told Johnson that Cheryl was living with the Creightons and that she picked him up by automobile so that they could spend his day furloughs together. Affidavit of William Johnson, ¶¶ 5, 6. Anderson knew Cheryl Dixon had been arrested for acting as Vadaain's accomplice on prior robberies. Finally, Anderson was told by Jamie Dixon that the Creightons owned a red or burgundy Oldsmobile, a car matching the description of the car used in the robbery. This was confirmed by computer shortly before or after Anderson spoke with Jamie Dixon. Anderson affidavit, ¶ 12.

Finally, exigent circumstances existed to justify Anderson's search at the Creighton residence without a warrant. In *Dorman* v. *United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970), the court identified six factors helpful in deter-

mining whether exigent circumstances existed.[3] The Eighth Circuit has applied these considerations in similar circumstances. *See, e.g., United States* v. *Kulcsar,* 586 F.2d 1283, 1287 (8th Cir. 1978). Consideration of these factors here indicates exigent circumstances existed. (1) A grave offense was involved here, armed robbery, and (2) the suspect was reasonably considered to be armed and dangerous based on his past record and fugitive status. (3) As already shown, Anderson had probable cause to believe Vadaain Dixon committed the robbery in question and (4) that he was at the Creighton residence. (5) There was a likelihood that Vadaain Dixon would escape if not swiftly apprehended in that he had just jumped bond, had a vehicle, and money from the robbery to finance his flight. (6) The initial entry into the Creighton home was peaceful. The alleged violent acts occurred after entry.[4]

Other factors further justify Anderson's search without a warrant. Warrantless entry has been held justified because of the officer's fear that the evidence thought to be inside would be destroyed if he waited to get a warrant. *See, e.g., United States* v. *Eddy,* 660 F.2d 381 (8th Cir. 1981). Here, Anderson knew the robber had a weapon, bait money, and clothing, all of which he could have disposed of in a short period of time.

Anderson also was in hot pursuit of the suspect, another circumstance justifying warrantless search. *See Warden* v. *Hayden,* 387 U.S. 294 (1967): *United States* v. *Easter,* 552

---

[3] These considerations are: (1) that a grave offense is involved; (2) that the suspect is reasonably believed to be armed; (3) that a clear showing of probable cause exists to believe the suspect committed the crime in question; (4) that there is strong reason to believe the suspect is in the premises being entered; (5) that a likelihood exists that the suspect will escape if not swiftly apprehended; and (6) that the entry, though not consented to, is made peacefully. *United States* v. *Kulcsar, supra* at 1287.

[4] The court again notes that there is no suggestion or allegation that Anderson was involved in the alleged violent acts.

F. 2d 230 (8th Cir.), *cert. denied,* 434 U.S. 844 (1977). He did not stop working on the case from his first call through and including the Creighton search. Positive identification of Vadaain Dixon by photo lineup occurred at about 8:00 p.m., entrance into the Creighton home at approximately 8:40 p.m. The officers first went to the family residence closest to their police station. They thought they could find James Dixon there who had assisted Vadaain in leaving town after a previous robbery. There they learned and confirmed that the Creightons owned a car matching the description from the robbery. They then went to Minnie Dixon's residence which was on the way to Creightons and where Jamie had said Vadaain might be. They quickly left there and proceeded to the Creighton residence. For all of these reasons based on undisputed facts, the warrantless search of the Creighton residence would appear to be reasonable and justified.

Pursuant to the proceeding analysis based on the undisputed facts in this case, Anderson is entitled to qualified immunity under *Harlow.*[5] Because this immunity applies to all aspects of the complaint against Anderson, his motion for summary judgment should be granted. The court has not been asked to and does not make any findings concerning the other defendants.

---

[5] Because Anderson's actions were correct in light of the law on warrantless search, the court need not consider Anderson's argument that that law was not clearly defined at the time of the events and that he therefore could not be held to have violated a "clearly established" constitutional right under *Harlow.*

Plaintiffs filed an offer of proof of facts thay feel they could establish if allowed "adequate time for discovery". Even if proven, however, the four facts listed in the offer of proof are no barrier to summary judgment here. It is irrelevant to this motion what the St. Paul paper reported, whether a policeman asked a neighbor about a car with a yellow license plate, or the fact that the F.B.I. did not search the home of Cheryl Donlin's (Dixon's) father.

Additional grounds exist for summary judgment on plaintiffs' claims against Anderson under sections 1983 and 1985. Section 1983 requires that the defendant acted under color of state law. Anderson, however, was a federal officer acting under federal law. The Creightons failed to allege any conspriacy to tie Anderson in with the non-federal officials, and no facts have been advanced to support such an allegation. Similarly, the Creightons failed to allege the requisite class-based animus in their claim based on section 1985.

The remaining named defendants have moved to remand this case to Ramsey County District Court upon a dismissal of claims against Anderson. Counsel for the Creightons stated they would have no objection to such remand if Anderson's summary judgment motion were granted. Accordingly, remand to state court is appropriate.

Finally, the Creightons moved to strike the affidavit with exhibits of Assistant United States Attorney Don M. Hopeman on the apparent grounds that it is irrelevant and prejudicial. Hopeman stated he had no objection to this motion and it is granted.

ORDER

Accordingly; based on all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that

1. The motion of defendant Anderson for summary judgement is granted.

2. The motion of the remaining defendants for remand of the remaining claims to state court is granted.

3. Plaintiff's motion to strike the affidavit with exhibits of Don M. Hopeman is granted.

DATED: JULY 16, 1984.

/s/ Diana Murphy

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5150-MN

ROBERT E. CREIGHTON, JR., ET AL., APPELLANTS,

v.

RUSSELL ANDERSON, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

Appellee's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

OCTOBER 15, 1985

85-1520

No._____

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1985

RUSSELL ANDERSON,

Petitioner,

vs.

ROBERT E. CREIGHTON, JR., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

MESHBESHER, SINGER & SPENCE, LTD.
Ronald I. Meshbesher,
Counsel of Record,
John P. Sheehy,
1616 Park Avenue
Minneapolis, Minnesota 55404

Counsel for Respondents

QUESTIONS PRESENTED

The Respondents believe the questions presented by this case can be more accurately and thoroughly stated as follows:

Is the Qualified, or So-Called Good Faith Immunity Defense, Available to a Law Enforcement Officer Who Conducts a Warrantless, Presumptively Unreasonable, Search in Violation of the Fourth Amendment?

Is Summary Judgment Appropriate Before Permitting Discovery When a Rank-and-File Law Enforcement Officer Claims He Is Entitled to Qualified Immunity and the Facts Necessary to Establish the Immunity Are Based on His Own Ex Parte Affidavits?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	ii
Jurisdiction	1
Constitutional Provisions	1
Statement of the Case	2
Conclusion	16

TABLE OF AUTHORITIES

	Page
Cases	
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971)	2
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	13,14
Mitchell v. Forsyth, 472 U.S. ___, 86 L.Ed.2d 411 (1985)	8,14
Steagald v. United States, 451 U.S. 204 (1981)	6
United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677 (1984)	10
Welsh v. Wisconsin, 466 U.S. 740 (1984)	7
Constitutional Provisions	
U.S. CONST. amend. IV	1,2,15

JURISDICTION

The Petitioner incorrectly states that the opinion of the Court of Appeals was entered on February 12, 1985. The opinion was filed on July 12, 1985. This does not affect this Court's jurisdiction.

CONSTITUTIONAL PROVISION

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

The Petitioner conducted a warrantless, presumptively unreasonable search of the Creighton family's home. The Creightons were not suspected of any crimes. Ultimately, Robert Creighton was beaten then jailed. No charges were filed against him.

The Creightons sued Russell Anderson, the Petitioner, for damages pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging he violated their Fourth Amendment rights.

The Petitioner requested an extension to respond to the complaint. Without filing an answer and before any discovery, he moved for summary judgment on the ground that his actions were legal because the search was conducted in exigent circum-

stances. In the alternative, he argued he was entitled to qualified immunity because the law on exigent circumstances was unclear.

The trial court, without permitting discovery, granted the motion, ruling that the Petitioner was entitled to qualified immunity because his actions were not illegal.

The Eighth Circuit Court of Appeals reversed the summary judgment because factual disputes existed concerning whether the Petitioner had probable cause and exigent circumstances. Further, the Court held that the Petitioner was not entitled to qualified immunity because the law on search warrants and exigent circumstances doctrine were clearly established when he conducted the warrantless search of the Creighton's home.

As a caveat, the Court should note that the Petitioner's brief minimizes the factual disputes present in the record. (The Court of Appeals' decision discusses these and they will not be repeated here.) The Court should also note that the "facts" as stated by the Petitioner are developed in the most part from the uncross-examined affidavit of an interested party -- the Petitioner. The lack of discovery denied the Respondents the opportunity to test the truth of the Petitioner's averments.

Finally, the Court should also be aware that the Petitioner himself never stated in his affidavit that he searched the Creighton home pursuant to the exigent circumstances doctrine. Sarisse Creighton said he told her "I don't need a damn search warrant when I am looking for a

fugitive." (Affidavit of Sarisse Creighton p. 6). The memorandum the Petitioner submitted to the trial court also indicates that the Petitioner himself did not articulate that the grounds for the search were exigent circumstances. His counsel's argument was entitled:

> Ex Post Facto Review of Russell Anderson's Actions Shows They Were in Accord With Such Established Statutory or Constitutional Standards as Existed to Guide Him.

(Defendant Russell Anderson's Memorandum of Points and Authorities, p. 8) (emphasis in original).

The Petitioner's statement to Sarisse Creighton indicates that he wrongly believed that he could search for a fugitive with only a fugitive warrant and that he did not need a search warrant. The fact that counsel's exigent circumstances

analysis was "ex post facto" corroborates this point. This leads to the conclusion that the Petitioner did not know of this Court's decision in Steagald v. United States, 451 U.S. 204 (1981), holding that a search warrant is needed to search the homes of third parties for a fugitive, even if the officer has a fugitive warrant.

REASONS FOR DENYING THE WRIT

(1) The Writ Should be Denied Because the Court of Appeals' Decision was Correct.

The Respondents agree that this case presents important questions concerning the proper standard for resolving a claim of qualified immunity by law enforcement officers. However, the Court of Appeals

reached the correct result in answering the question in this case.

a) The Application of the Qualified Immunity Doctrine in this Context Would, In Effect, Change the Long-Established Rule That Warrantless Searches are Presumptively Unreasonable.

First, the application of the qualified immunity doctrine in the context of the exigent circumstances doctrine presents a unique problem. The general rule is that warrantless searches are presumptively unreasonable, see Welsh v. Wisconsin, 466 U.S. 740 (1984), as was the Petitioner's in this case, and that an officer conducting a warrantless search, especially in a home, bears a heavy burden to justify his actions. Id.

The exigent circumstances doctrine turns on the facts and circumstances of each case. Nevertheless, the search is

considered per se unreasonable until proved otherwise by the officer. To apply the qualified, or so-called good faith immunity defense in this context, simply because the exigent circumstances doctrine requires an application of the various factors to the facts at hand, would be to work a substantive change in Fourth Amendment law. This court specifically recognized this issue in Mitchell v. Forsyth, 472 U.S. ___, 86 L. Ed. 2d 411 (1985), where Justice White wrote:

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances . . . .

86 L.Ed. at 431 n. 12.

The result of applying the qualified immunity defense in the context of exigent circumstances would be to create a new rule: when in doubt, search. The correct rule is, was, and should be: when in doubt, get a warrant. Permitting qualified immunity in the exigent circumstances context will undermine this Court's policy of promoting the use of search warrants.[1]

---

[1]It is relevant to note that at common law, an officer searching for a fugitive with a fugitive warrant was not immune if he entered the home of a third person and the fugitive was not there. Sir Mathew Hale wrote:

> If a justice of peace issue a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the officer may break open the door to take him; and the same law is, if it be but for suspicion of felony.
>
> And so much more may he break

This Court should take especially careful notice that, although this is a civil case, it would be presenting the question of whether the good faith exception to the exclusionary rule developed in United States v. Leon, 468 U.S. ___, 82 L.Ed.2d 677 (1984), applies in the context of exigent circumstances. Justice Brennan, in his dissent in Leon, felt that the application of the good faith doctrine in the context of exigent circumstances would present an extremely difficult constitutional problem. 82 L.Ed.2d at 722.

> open the house of another person to take him, for so the sheriff may do upon a civil process. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger, whose house it is . . .

II M. Hale, Historia Placitorum Coronae, (1736), 116-117 (citations omitted)

Although the question presented by this case is of tremendous importance for the Fourth Amendment, the Court should deny the writ because the Eighth Circuit Court of Appeals correctly decided the case. If this Court accepts this case for review, the decision should be affirmed. Acceptance of the Petitioner's position would inevitably damage this Court's policy of promoting the use of search warrants.

b). Because The Court of Appeals Correctly Held that Factual Disputes Precluded Summary Judgment the Issue the Petitioner Presents Would Not Be Reached By This Court If The Writ Were Granted.

The Court of Appeals held that factual disputes precluded summary judgment. This holding was correct and would preclude this Court from reaching the

broader and important constitutional issue raised by the Petitioner.

Although the Respondents have always maintained that even if the facts the Petitioner claims he knew are in fact true, his search was still illegal because the facts fail to establish either probable cause or exigent circumstances to search their home.

In any case, if the facts he averred established probable cause and exigent circumstances, summary judgment was not appropriate for two reasons.

First, those facts are in dispute. (Because the Court of Appeals' opinion discusses these disputes they will not be re-examined here.)

Second, summary judgment should not have been granted on the ex parte affi-

davit of the Petitioner, who was an interested party, without permitting discovery.

The trial court misapplied the dicta in Harlow v. Fitzgerald, 457 U.S. 800 (1982) which indicated that summary judgment may be appropriate before discovery if the law was unclear. This procedure involves a purely legal, not factual, analysis. When a summary judgment motion is based on the facts and circumstances of the case -- as the Petitioner now makes the central theme of his application to this Court -- rather than on the state of the law, the Harlow dicta on discovery is not applicable. In cases involving a claim of exigent circumstance, the law enforcement officers (who will almost ineveitably be the defendants) will possess nearly all the facts necessary to contest the issue. Further, their credi-

bility will be at issue because of their interest in the suit. It is inappropriate and unfair under these circumstances to allow a defendant to establish a defense on his own affidavit without permitting discovery.

Further, a rank-and-file law enforcement officer should not be routinely exempt from discovery. These officers are routinely involved in litigation. These are not high government officials like those in Harlow and Mitchell v. Forsyth, who should be more highly protected from the interference of litigation over undecided issues of law.

The Court should deny the writ because the Court of Appeals correctly held factual disputes precluded summary judgment and because the trial court did not permit discovery.

If the Court granted the writ, it may not reach the broader questions presented by this case because of the factual disputes. However, if the writ were granted the Court should affirm the Court of Appeals because factual issues exist and because discovery was incorrectly denied the Respondent.

(2) The Court Should Deny The Writ Because the Court of Appeals Decision Is Not In Conflict With Decisions Of This Court Or Other Courts of Appeal.

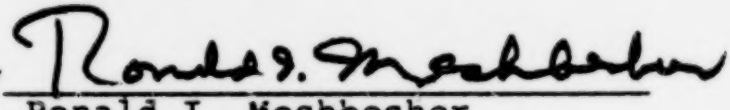
This case involves the application of the qualified immunity defense in the context of a warrantless, presumptively unreasonable, search. The Petitioner has not revealed any decision of this Court or of other Courts of Appeal presenting a similar factual and legal context which conflicts with the decision of the Eighth Circuit Court of Appeals.

The claimed conflict does not exist. The comparison of this case to cases involving due process rights to hearings, warrantless arrests, cruel and unusual punishment cases, et cetera involves faulty reasoning because it fails to take into account the uniqueness of the issue stemming from the subtantive Fourth Amendment law making warrantless searches presumptively unreasonable.

CONCLUSION

For these reasons, the Court should deny the writ.

MESHBESHER, SINGER & SPENCE, LTD.

By 

Ronald I. Meshbesher
Counsel of Record
John P. Sheehy
Counsel for Respondent
1616 Park Avenue
Minneapolis, MN 55404
Tel: (612) 339-9121

Supreme Court, U.S.
FILED
AUG 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1520

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

RONALD I. MESHBESHER
JOHN P. SHEEHY
Meshbesher, Singer & Spence, Ltd.
1616 Park Avenue
Minneapolis, Minn. 55404
(612) 339-9121

Counsel for Respondents

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED MARCH 14, 1986
CERTIORARI GRANTED JUNE 30, 1986

6 PP

TABLE OF CONTENTS*

	Page
Relevant Docket Entries	1
Complaint	3
Affidavit of Russell Anderson	16
Affidavit of William Johnson	38
Affidavit of Robert Creighton, Jr.	43
Affidavit of Sarisse Creighton	46
Affidavit of Iris Dixon	53
Affidavit of Robert Creighton, Sr.	58
Order Granting Certiorari	59

* The decision of the district court and the decision of the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-5150

ROBERT E. CREIGHTON, JR., ET AL., APPELLANTS

v.

THE CITY OF ST. PAUL, ET AL.,
RUSSELL ANDERSON, APPELLEE

1984	
Aug. 23	Case docketed.
1985	
Feb. 12	Case argued and submitted before Judges Lay, C.J. Heaney and Fagg.
July 12	Opinion by Judge Heaney issued; judgment issued.
Sept. 26	Appellee's petition for rehearing and suggestion for rehearing en banc filed.
Oct. 15	Petition for rehearing and petition for rehearing en banc denied.

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MINNESOTA

4-84 Civil 162

ROBERT E. CREIGHTON, JR., ET AL.,

v.

THE CITY OF ST. PAUL, ET AL.

Cases Filed 02/28/84

DATE	EVENT
2/84/84	Petition of Russell Anderson for removal filed.
4/11/84	Notice and motion of Russell Anderson to dismiss or, in the alternative, for summary judgment filed.
4/16/84	Affidavit of Russell Anderson filed.
5/30/84	Affidavits of Sarisee Creighton, Robert Creighton, Robert Creighton, Jr., Robert Creighton, Sr., and Iris Dixon filed.
6/4/84	Affidavits of William Johnson, E. Joseph Cludy, and Jon M. Hopeman filed.
6/5/84	Affidavit of Wayne Ruud filed.
6/6/84	Hearing on motion to dismiss or, in the alternative, for summary judgment.
7/17/84	Memorandum opinion and order filed granting Russell Anderson's motion for summary judgment.
8/16/84	Plaintiffs' notice of appeal filed.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF RAMSEY
SECOND JUDICIAL DISTRICT

ROBERT E. CREIGHTON, JR. AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, PLAINTIFFS,

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS; RUSSELL ANDERSON, AND JOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US, DEFENDANTS.

COMPLAINT

Plaintiffs, as and for their complaint herein, state and allege as follows:

JURISDICTION

I.

Jurisdiction of this Court is invoked pursuant to the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Title 42, United States Code, Sections 1983, 1985 and 1988 and Title 28, United States Code, Sections 1331, 1343(1), (3) and (4), and pursuant to the laws of the State of Minnesota.

II.

This is an action brought pursuant to the United States Constitution, the common law and Constitution of the State of Minnesota and pursuant to 42 USC §§ 1983, 1985 and 1988 alleging plaintiffs were deprived of their rights, privileges, and immunities secured by the Constitution and laws of the United States and were subjected to a conspiracy to deprive them of their rights, privileges and immunities by defendants herein acting under color of law.

III.

During all times herein mentioned, the defendants were acting under codes, statutes, ordinances, regulations, customs and usages, and under color of law of the State of Minnesota, County of Ramsey, City of St. Paul.

IV.

Plaintiff seeks monetary damages pursuant to 28 USC § 1331, §§ 1343(1), (3) and (4), and pursuant to the laws of the State of Minnesota.

VENUE

V.

Venue is based upon 28 USC § 1391(b) and the laws of the State of Minnesota.

PARTIES

VI.

Plaintiffs Robert E. Creighton, Jr. and Sarisse Creighton are husband and wife and are the parents and natural guardians of Plaintiff Shaunda Creighton and Plaintiff Tiffany Creighton and all are citizens of the United States of America and residents of Ramsey County, State of Minnesota.

VII.

The defendant City of St. Paul is a municipal corporation duly organized and existing under the laws of the State of Minnesota.

VIII.

Upon information and belief defendant John DeNoma is an officer with the police department of the City of St. Paul.

IX.

Upon information and belief, defendants Daniels, Ashton, Gelao, Snyder and Steffan are officers with the police department of the City of St. Paul, but whose true first names are unknown to plaintiffs herein.

X.

Upon information and belief defendant Russell Anderson is an agent of the Federal Bureau of Investigation and acted in concert with the other individual defendants herein; that Defendants John Doe, Richard Roe and Michael Moe are agents of the FBI whose true names and identities are unknown to Plaintiffs; that John Doe, Richard Roe and Michael Moe acted in concert with the other individual Defendants herein.

COUNT ONE

42 USC § 1983 Action

Plaintiffs, as and for their first claim, state and allege as follows:

XI.

At all times herein mentioned, the defendant City of St. Paul was the governmental entity in the name of which defendants DeNoma, Daniels, Ashton, Gelao, Snyder and Steffen performed all acts and omissions herein alleged.

XII.

At all times herein mentioned, the City of St. Paul provided defendants DeNoma, Daniels, Ashton, Gelao, Snyder and Steffen with official uniforms, identification, badges, and duties which described, delineated, and emboldened them as officers of the City of St. Paul Police Department.

XIII.

At all times herein mentioned, defendants DeNoma, Daniels, Ashton, Gelao, Snyder and Steffen were acting within their official capacity, within the scope of their employment pursuant to official policy of the City of St. Paul.

XIV.

At all times herein mentioned, defendant Russell Anderson, defendant John Doe, defendant Richard Roe, and defendant Michael Moe acted in concert with defendants DeNoma, Daniels, Ashton, Gelao, Snyder and Steffen and within the scope of their employment as federal law enforcement officers.

XV.

That on or about November 11, 1983 defendants above named, while armed with shotguns and other firearms, entered plaintiffs' home at 845 West Minnehaha Avenue in the City of St. Paul, County of Ramsey, State of Minnesota, without appropriate search and arrest warrants and without probable cause and under threats of force and violence; that plaintiff Robert E. Creighton, Jr. was assaulted and beaten and plaintiff Sarisse Creighton, Shaunda Creighton and Tiffany Creighton were subjected to fear, intimidation, and verbal and physical abuse and

were otherwise held prisoner in their house by defendants herein acting in concert without probable cause and under color of law.

XVI.

That defendants herein arrested plaintiff Robert E. Creighton, Jr. and otherwise restricted his liberty and acted in concert without probable cause and under color of law.

XVII.

That subsequent to his arrest, plaintiff Robert E. Creighton, Jr. was transported to, and was incarcerated in, the Ramsey County Jail; that plaintiff was ultimately released without being charged.

XVIII.

That the individual defendants, jointly and separately, acted within the scope of their official capacities and knowingly, willfully and wantonly acted with intent to deprive plaintiffs of their constitutional rights guaranteed under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and 42 USC § 1983, including but not limited to:

1. The rights of plaintiffs to be free from unlawful interference and to be secure in their persons and homes from unlawful and unreasonable searches and seizures;
2. The rights of plaintiffs to be free from unlawful arrest, detention and incarceration;
3. The rights of plaintiffs to be free from excessive force and physical brutality;
4. The rights of plaintiffs to privacy;

5. The rights of plaintiffs to be free from police harassment;
6. The rights of plaintiffs to equal protection of the laws; and
7. The rights of plaintiffs to due process of law.

XIX.

That as a direct and proximate result of the acts of the defendants herein as alleged, plaintiffs were caused to sustain injuries and damages to their person, psyche and body, some of which are permanent; that they have incurred and/or will in the future incur, medical and other expenses in an attempt to cure and relieve themselves of their injuries; that they sustained great pain, suffering and mental anguish, all to their damage in a reasonable amount in excess of Fifty Thousand and no/100 ($50,000.00) Dollars.

XX.

That as a direct and proximate result of the acts of the defendants herein the plaintiffs were caused to incur harassment and intimidation, and suffered and will in the future suffer, great anxiety, embarrassment and public humiliation; that plaintiff's reputation in the eyes of the public were impaired and plaintiffs lost time from their family and home; and plaintiffs suffered other dignitary losses; all to their damage in a reasonable amount in excess of Fifty Thousand and no/100 ($50,000.00) Dollars.

XXI.

That as a direct and proximate result of defendant's intentional acts and wanton and willful indifference to the constitutional rights of plaintiffs as alleged, the defendant, and each of them, should be made to respond in punitive damages in a reasonable amount in excess of Fifty Thousand and no/100 ($50,000.00) Dollars.

XXII.

If plaintiffs prevail in this action for deprivation of their constitutional rights, plaintiffs are entitled to be awarded their attorney's fees pursuant to Public Law 94-559, the Civil Rights Attorney's Fees Award Act of 1976, 42 USC § 1988.

COUNT TWO

Deprivation of Rights By Federal Officers

XXIII.

That the acts of Defendant Russell Anderson, Defendant John Doe, Defendant Richard Roe and Defendant Michael Moe hereinbefore alleged violated plaintiffs' rights and immunities as guaranteed and secured to them under the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution including, but not limited to:

1. The rights of the plaintiffs to be free from unlawful interference and to be secure in their persons and homes from unlawful and unreasonable searches and seizures;
2. The rights of plaintiffs to be free from unlawful arrest, detention and incarceration;
3. The rights of plaintiffs to be free from excessive force and physical brutality;
4. The rights of plaintiffs to privacy;
5. The rights of plaintiffs to be free from police harassment;
6. The rights of plaintiffs to equal protection of the laws; and
7. The right of plaintiffs to due process of law.

XXIV.

That a direct and proximate result of such deprivation of constitutional rights, plaintiffs sustained injuries and damages as more fully alleged in Count One.

XXV.

That as a direct and proximate result of such deprivation of constitutional rights, defendants should be made to respond in punitive damages as more fully alleged in Count One.

COUNT THREE

42 USC § 1985 Conspiracy

Plaintiffs, as and for their third claim herein, reallege and reaffirm each and every allegation, matter and thing in Count One and Count Two of their Complaint with the same force and effect as if set forth at length and in detail herein, and further state and allege as follows:

XXVI.

That the individual defendants did conceive, foster, enter into, advise, and conspire with one another to deprive plaintiffs of their constitutional rights as alleged in Count One in violation of 42 USC § 1985.

XXVII.

That as a direct and proximate result of such conspiracy plaintiffs sustained injuries and damages as more fully alleged in Count One.

XXVIII.

That a direct and proximate result of such conspiracy, defendants should be made to respond in punitive damages as more fully alleged in Count One.

COUNT FOUR

Intentional Infliction of Emotional Distress

Plaintiffs, as and for their fourth claim herein, reallege and reaffirm each and every allegation, matter and thing in Counts One, Two and Three of their Complaint with the same force and effect as if set forth at length and in detail herein, and further state and allege as follows:

XXIX.

The acts of defendants, and each of them, as alleged, constitutes extreme and outrageous conduct and was willfully, wantonly and recklessly indifferent to plaintiffs' rights resulting in severe physical and emotional distress. The acts of defendants constitutes intentional infliction of emotional distress under the common law of the State of Minnesota.

XXX.

That as a direct and proximate result of such intentional infliction of emotional distress, plaintiffs sustained injuries and damages as more fully alleged in Count One.

XXXI.

That as a direct and proximate result of such intentional infliction of emotional distress, defendant's should be made to respond in punitive damages as more fully alleged in Count One.

COUNT FIVE

Assault and Battery

Plaintiffs, as and for their fifth claim herein, reallege and reaffirm each and every allegation, matter and thing

in Counts One, Two, Three and Four of their Complaint with the same force and effect as if set forth at length and in detail herein, and further state and allege as follows:

XXXII.

That the defendant City of St. Paul, through its agent and employee, defendant DeNoma, in his individual capacity, did cause the intentional and malicious assault and battery of plaintiff Robert E. Creighton without his consent.

XXXIII.

That as a direct and proximate result of such intentional assault and battery, plaintiffs sustained injuries and damages as more fully alleged in Count One.

XXXIV.

That as a direct and proximate results of such assault and battery, defendant DeNoma should be made to respond in punitive damages as more fully alleged in Count One.

COUNT SIX

False Arrest and Imprisonment

Plaintiffs, as and for their sixth claim herein, reallege and reaffirm each and every allegation, matter and thing in Counts One, Two, Three, Four and Five of their Complaint with the same force and effect as if set forth at length and in detail herein, and further state and allege as follows:

XXXV.

That the defendant City of St. Paul, through its agents and employees DeNoma, Daniels, Ashton, Gelao, Snyder

and Steffen, in their individual capacity, and defendant Anderson, caused the wrongful and false arrest and imprisonment of plaintiff Robert E. Creighton, Jr., by unlawfully restraining him against his will and causing plaintiff to undergo the humiliating and embarrassing procedures upon arrest, including but not limited to, arrest, interrogation and incarceration in the Ramsey County Jail.

XXXVI.

That as a direct and proximate result of such wrongful and false arrest and imprisonment, plaintiffs sustained injuries and damages as more fully alleged in Count One.

XXVII.

That as a direct and proximate result of such unlawful false arrest and imprisonment, defendants should be made to respond in punitive damages as more fully alleged in Count One.

COUNT SEVEN

Negligence

Plaintiffs, as and for their seventh claim herein, reallege and reaffirm each and every allegation, matter and thing in Counts One, Two, Three, Four, Five and Six of their Complaint with the same force and effect as if set forth at length and in detail herein, and further state and allege as follows:

XXXVIII.

That the defendant City of St. Paul, through its employees and agents, defendants DeNoma, Daniels, Ashton, Gelao, Snyder and Steffan, in their individual

capacities, and defendant Anderson, did negligently disregard the rights and interests of the plaintiffs herein; that such negligence includes, but is not limited to:

1. Failure to properly investigate and ascertain the presence of persons in the premises located at 854 West Minnehaha, City of St. Paul, State of Minnesota, prior to entry;
2. Failure to properly acquire a warrant to search plaintiffs' premises;
3. Failure to properly instruct and supervise the defendants DeNoma, Daniels, Ashton, Gelao, Snyder and Steffan in proper police procedure regarding searches and seizures, with and without warrants; and,
4. The defendants were otherwise negligent and careless.

XXXIX.

That as a direct and proximate result of such negligence and carelessness, plaintiff sustained injuries and damages as more fully alleged in Count One.

WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, as follows:

1. Compensatory damages in a reasonable amount in excess of Fifty Thousand and no/100 ($50,000.00, Dollars;
2. Punitive damages in a reasonable amount in excess of Fifty Thousand and no/100 ($50,000.00) Dollars;
3. Attorney's fees pursuant to 42 USC § 1988;
4. Interest, costs and disbursements herein; and
5. Such other and further relief as this Court deems just and equitable.

MESHBESHER, SINGER & SPENCE, LTD.

By /s/ FRED H. PRITZKER

Fred H. Pritzker
Atty. No. 88456

Michael C. Snyder
Atty. No. 140648
Attorneys for Plaintiffs
1616 Park Avenue
Minneapolis, MN 55404-1695
Telephone No. (612) 339-9121

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-162

ROBERT E. CREIGHTON, JR. AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, PLAINTIFFS,

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS; RUSSELL ANDERSON, AND JOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US, DEFENDANTS.

AFFIDAVIT OF DEFENDANT RUSSELL ANDERSON

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Russell C. Anderson, being first duly sworn under oath, deposes and says that:

1. I am one of the named defendants in this action.

2. At all times relevant to this action, I was acting within the scope and course of my employment as a Special Agent with the St. Paul resident agency of the Federal Bureau of Investigation (F.B.I.) assigned to criminal investigations.

3. November 11, 1983, was Veterans' Day, a legal holiday, and I was home with my family on that day.

4. At approximately 3:30 p.m. on November 11, 1983, I received a telephone call at home from the F.B.I. night clerk advising me that Minnesota Federal Savings and Loan at 1827 Grand Avenue in St. Paul, Minnesota had been robbed. I decided to go to the savings and loan to investigate, and I did so immediately, arriving there at approximately 4:30 p.m.

5. At the savings and loan I investigated the robbery with the help of two other F.B.I. agents and Sergeant John Gelao of the St. Paul police, and other officers of the St. Paul Police Department. I spent two hours at the bank, and learned the following facts: The robber was described by the teller who was robbed as a black male in his late twenties, six feet tall, 170 pounds, of average build and light complexion, who wore a short, neat Afro hairstyle, a short beard and moustache which curved down around his lips, and a waist length jacket of light color. The teller said that the robber approached her window, said to her, "This is a holdup," and showed her the butt of a handgun under his left armpit, and then said, "Fill the bag." The robber also said at least ten times, "Don't press the alarm, get the big bills." The teller gave the robber three or four $100 bills. The robber then said, "Give me the $20's." The teller gave him the $20's and then took the "bait money" out of her drawer and gave it to the robber. "Bait money" is marked money which can later be used as evidence against a suspect. The bait money consisted of two $20 bills, two $10 bills, two $5 bills, and five $1 bills. The robber then left. The bank's surveillance camera was not activated; no surveillance photographs were taken of the robber.

6. I also learned from St. Paul police officers who had interviewed witnesses from the neighborhood that the rob-

ber had escaped in a car described as a burgundy or maroon over silver car, possibly a Buick. Other witnesses said it was possibly a darker color.

7. By 6:30 p.m. on November 11, 1983 I began to suspect that the robber was Vadaain David Dixon (my suspicions were confirmed some days later when an accomplice, Jeffrey Lynn Barge, was arrested and gave a complete statement naming Dixon as the robber). My reasons for suspecting Dixon were as follows: The description the teller gave was identical to Dixon's height, weight, build, race, hair and complexion. Dixon had been arrested on May 19, 1983 in Juarez, Mexico, where he had gone to purchase illegal drugs. He was charged by a federal grand jury with seven bank robberies. In October of 1983 he plead guilty to four of those robberies: one that occurred on April 19, 1983 at Midwest Federal Savings and Loan in the Twin Cities, one at Marquette-Lake Bank in the Twin Cities, and at banks in Omaha, Nebraska and Portland, Oregon. In each of the robberies to which he plead guilty, he had had an accomplice. In the Omaha and Portland robberies, Cheryl Ann Donlin Dixon, Vadaain Dixon's wife, had admitted driving the getaway car. Cheryl Ann Dixon had been arrested May 19, 1983 in Dallas, Texas. Vadaain Dixon had admitted using a handgun in some of the robberies. Dixon had plead guilty in United States District Court in Minneapolis to these robberies before Judge MacLaughlin and was released on bond pending a presentence investigation. Cheryl Ann Dixon was released on bond after her arrest in May pending trial. Vadaain Dixon was ordered to the Volunteers of America residence as a condition of his release. He stayed there from October 13, 1983 to November 9, 1983, and was given day furlough privileges. As of 6:00 p.m. on November 9, 1983 Vadaain Dixon had not returned to the Volunteers of America residence. A warrant for his arrest for bond default was

issued. On November 11, 1983 when I investigated the savings and loan robbery at 1827 Grand Avenue in St. Paul, I knew that Vadaain Dixon was at large and a federal fugitive.

8. At approximately 6:30 p.m. I left the savings and loan and went to the St. Paul Police Department on Tenth Street in St. Paul to prepare a "photo spread" in order to confirm that the suspect was Vadaain Dixon. I arrived at the police department at approximately 7:00 p.m. and prepared the photographs with the help of St. Paul police officers. The two tellers who had seen the robber went to the St. Paul Police Department at approximately 7:30 p.m. on November 11 as requested. The two tellers were, independently of each other, shown the photo spread to see whether they could identify Dixon. The usual photo spread includes six photos. This one included twelve photos. All the photos were of black males with beards. Both tellers selected Vadaain David Dixon's picture as being that of the bank robber. Neither of them selected any other photos as being a possible photo of the robber. By this time it was approximately 8:00 p.m. I had not at any time between 3:30 p.m. and 8:00 p.m. left the field or interrupted the investigation. The other two F.B.I. agents who had assisted me in the investigation at the savings and loan had gone home and did not accompany myself or the tellers to the St. Paul Police Department.

9. Sergeant Gelao and myself then pooled our knowledge of Vadaain Dixon. We met briefly with the watch commander of the St. Paul Police Department, who called in Sergeant John De Noma and a team of uniformed St. Paul officers to assist in the immediate apprehension of Dixon. Gelao, De Noma, myself and the officers met in a parking lot one block away from the residence of Iris Dixon, Vadaain Dixon's mother, in St. Paul. We knew that Vadaain Dixon was armed and very dangerous. He was drug-dependent, a user of hard narcotics. He had a record

of robbery with guns dating back to 1974. A copy of his F.B.I. record prior to the string of 1983 bank robberies is attached to this affidavit marked as Exhibit A. In August of 1979, shortly after release from state prison, he had robbed Reiss' Liquor Store in St. Louis Park, Minnesota with Cheryl Ann Dixon and another accomplice armed with a handgun. The accomplice pistol-whipped store employees and customers and took a hostage at gunpoint. Vadaain Dixon attempted to escape from police at the scene and tried to run over a St. Louis Park police officer in an automobile at high speed. Shots had then been fired at Dixon, who did not stop and who then crashed into the truck of an innocent bystander and was arrested. Please see attached Exhibit B for police reports. All of these facts were known to me at 8:00 p.m. on November 11, 1983. Because of Vadaain Dixon's propensity for violence, I resolved for the sake of the public safety to arrest him as swiftly as possible.

10. Cheryl Ann Dixon had informed me during my investigation of the earlier bank, robberies that his brother Jamie Dixon had driven Vadaain Dixon and Cheryl Ann Dixon to Milwaukee, Wisconsin after one of the seven earlier bank robberies which occurred April 19, 1983. We also knew that Jamie would be at the home of his mother, Iris Dixon, living at 676 Dayton in St. Paul. We went to the house of Iris Dixon at 676 Dayton in St. Paul. Please see attached Exhibit C for scale map showing locations. I was accompanied by Gelao, De Noma, and the other officers. De Noma was in full uniform, as were most of the other officers. We arrived there at 8:15 or 8:30 p.m. We found Iris Dixon and Jamie Dixon there. We informed them that a bank had been robbed, that we had an arrest warrant for Vadaain Dixon, and that we wanted to know where he was. With their consent, we searched the premises at 676 Dayton. Jamie Dixon told us that Jamie had in the past used the residence of his grandmother, 908

Aurora in St. Paul, as an occasional residence and mailing address. At out request, Jamie provided us with the address of Vadaain's other siblings and a description of the automobiles owned by them.

11. Jamie Dixon advised us that Robert and Sarisse Creighton, residing at 845 West Minnehaha in St. Paul, owned a 1977 Oldsmobile Cutlass, red or burgundy in color. Robert and Sarisse Creighton are the plaintiffs in this case.

12. I knew from my investigations of previous bank robberies committed by Vadaain Dixon that Sarisse Creighton was Vadaain Dixon's sister. I also knew that Cheryl Ann Donlin Dixon, Vadaain Dixon's wife, had resided with Robert and Sarisse Creighton from May of 1983, after her arrest in Dallas for the Omaha bank robbery, to November 9, 1983, the day Vadaain Dixon jumped his bond. I also knew that Vadaain Dixon has stayed on a daily basis at the house of Robert and Sarisse Creighton with Cheryl Ann Donlin Dixon during his four-hour daily furloughs from the Volunteers of America residence from October 13 to approximately November 9, 1983. We had confirmed by computer, either shortly before talking to Jamie Dixon or shortly after talking to Jamie Dixon, that Robert Creighton owned a maroon or burgundy 1977 Oldsmobile Cutlass, similar to the car used in the bank robbery.

13. At approximately 8:30 p.m., Gelao, De Noma, myself and the other officers left 676 Dayton and went to the home of Minnie Dixon at 908 Aurora. Minnie Dixon stated to us that she had not seen Vadaain Dixon. With her consent we searched the residence and then left immediately for the residence at 845 West Minnehaha. We arrived there at approximately 8:40 p.m.

14. Officer Gelao, Officer De Noma, and I went to the front door of 845 West Minnehaha. De Noma was in police uniform and held a shotgun. The other officers sta-

tioned themselves around the outside of the house, including the back. De Noma knocked on the door. Robert Creighton answered the door. De Noma identified himself as Sergeant John De Noma of the St. Paul police department, informed Creighton that there had been a bank robbery, and told him we had a warrant for the arrest of Vadaain Dixon. Gelao, De Noma, and myself then walked into the Creighton residence. I identified myself as an F.B.I. agent. Gelao identified himself as a St. Paul police officer. Robert Creighton asked to see our warrant. He was informed that we did not have it in our physical possession and that we were not required to produce it. Officer De Noma and I explained to Creighton in great detail the events of the bank robbery, the fact that Vadaain Dixon was a suspect, and where we had earlier been in search of Vadaain. While we spoke to Robert Creighton, some of the other officers entered the house and quickly searched for Vadaain Dixon, confirming that he was not there. At no time did Robert Creighton indicate whether Vadaain Dixon was or was not there. At no time did Robert Creighton tell us to leave.

15. During our conversation with Robert Creighton, Sarisse Creighton began screaming, jumping over furniture, and running around the apartment. She ran upstairs and came back down with three children with her. She screamed at the children to run, so they ran out the back door. During this time the telephone was ringing. Sarisse Creighton picked up the phone and screamed into it, "Get off the m_____ f____ing phone!" and slammed down the receiver. The children were brought back into the house by the officers in back.

16. Gelao and I were talking to Robert Creighton about his car. He agreed to take us down to the car, which was downstairs in a tuck-under garage. Robert Creighton was becoming more and more agitated by Sarisse Creighton's hysterical conduct. Robert Creighton, De

Noma, Gelao and myself went down the stairs to the garage in that order. On the way down the stairs Robert Creighton began jabbing his hand at De Noma and his shotgun. I heard De Noma say three times, "Don't touch me; don't touch my weapon." Creighton then attempted to grab De Noma's shotgun. De Noma then struck Creighton a single blocking punch in the mouth. We then examined, but did not search, the Creighton car.

17. De Noma then took Robert Creighton upstairs to get a towel to stop a small amount of bleeding from his mouth. By this time, Sarisse Creighton was screaming so hysterically that the children began screaming hysterically. At this time, a man who later proved to be Robert Creighton's father arrived at the house. He refused to identify himself and began screaming abusively at myself and the other officers. We patiently explained all over again that there had been a bank robbery, that we had a warrant to arrest Vadaain Dixon, that we had already been to Iris and Minnie Dixon's, and that the robbery car was similar to Robert Creighton's.

18. Iris and Jamie Dixon then arrived. We then patiently explained again the reasons why we were at the residence. We were in the house for perhaps twenty minutes. Robert Creighton was placed under arrest by the St. Paul police on state charges of obstructing legal process and taken to the St. Paul police station. He was released the next day. I left the house after his arrest, as did all other officers with us.

19. Sarisse Creighton appeared at the St. Paul police station later the night of November 11, 1983, and threatened to blow the place up. She was not arrested.

Vadaaine Dixon is still a federal fugitive. He has been charged by a federal grand jury with the November 11, 1983 robbery of Minnesota Federal Savings and Loan.

/s/ RUSSELL C. ANDERSON
Russell C. Anderson

SUBSCRIBED and SWORN to before me this
16th day of April, 1984.

/s/ E. ANN HERNANDEZ
(Notary Public)

25

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

PAGE 1

05/23/83

Use of the following FBI record, NUMBER 4C7 438 N5 is REGULATED BY LAW. It is furnished FOR OFFICIAL USE ONLY and should ONLY BE USED FOR PURPOSE REQUESTED. When further explanation of arrest charge or disposition is needed, communicate directly with the agency that contributed the fingerprints. 02

Contributor Identifier (ORI) Name Case Number (OCA)	Subject Name State Number (SID)	Arrested or Received	C - Charge D - Disposition
ATIONAL CRIME INFORMATION CENTER FGPT.		CLASS:	AA PM 04 PI CC AA AA CI CI 15
THE SUBJECT'S IDENTIFICATION RECORD APPEARING HEREUNDER HAS BEEN RETRIEVED FROM THE IDENTIFICATION DIVISION FILES BASED ON THE FBI OR SID NUMBER SUBMITTED THROUGH THE INTERSTATE IDENTIFICATION INDEX.			
N02711CC OLICE DEPARTMENT INNEAPOLIS,MN 2556	DIXON, VADAAIN CAVID MAP7402460	07/07/74	C-ADDITIONAL CITATION WITHOUT CHARGE-ARREST CHARGE C-ROBB/BUS/GUN 1201 D-CHARGE DISMISSED-07/22/74 C-CHANGED TO AGG ROBBERY D-CONVICTED-11/25/74 PROBATION-7Y 0-7 ST CLOUD SENT STYD 7 YRS
4082015C INN CORR FACILITY TILLWATER,MN 7113	DIXON, VADAAIN CAVID MAP74C246C	12/C8/76	C-BURGLARY D-CONVICTED- CONFINEMENT-5Y CONDITIONAL RELEASE-02/28/79 PRE/REL
10272100)LICE DEPARTMENT .INT LOUIS PARK,MN 012995	DIXON, VADAAIN CAVID MA74002460	C8/28/79	C-AGGRAVATED ROBBERY A1201 D-HELD- C-KIDNAPPING 1007 D-HELD- D-031007 C3 C-AGGRAVATED ASSAULT 1304 D-CHARGE DISMISSED-11/15/79 C-AGG RCB CHNGE TO ROB D-CONVICTED-11/15/79 CONFINEMENT-10Y PRESON
0620900 LICE DEPARTMENT INT PAUL,MN 015540	DIXON, VADAAIN CAVID MA74002460	10/11/79	C-WARR AGG ROBBERY 1299 2 CTS D-CONVICTED-12/28/79 CONFINEMENT-3Y-5Y PG CONCURRENT

-6-

TINUED NEXT PAGE

215-03686

91A7476

Exhibit A

25

BEST AVAILABLE COPY

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(26)

ST. LOUIS PARK POLICE DEPT.
MN0272100

cc: St. Paul Robbery Div. 9/10

Supervisor Approved S/A

Date/Time of Report 8/28/79 1230

ARREST/VIOLATION REP

Page 1 of 2

Reporting Officer R/O	Assisting Officer(s) A/O	Grid No.	Complaint No.
Investigator Good	Fitzgerald, Setter, Beltrand Ortner, Luse, Shook, Adelson, Korbel, Stimson	28	79012995

How Complaint Received: Found by Police ☐ Radio ☒ Citizen ☐ Station ☐ Letter ☐ Phone ☐

Felony ☒ Gross Misdemeanor ☐ Tab Charge ☐ Req. for Complaint ☐ Warrant Arrest ☐ Not Guilty Plea ☐ Ticket No.

Offense, Incident, Charge	Ordinance/Sec. No.	State Statute:	UOC
AGGRAVATED ASSAULT		609.225	
AGGRAVATED ROBBERY		609.245	
KIDNAPPING		609.25	

Date/Time Occurred	Location of Violation or Offense:
8/27/79 1820 hours.	6900 West Lake Street

Defendant/Suspect (Last Name) (First) (Middle)	DOB	Age	Sex	Race	License Number (D.L.)
Dixon, Vadaain David	1/20/54	25	M	N	D-250-839-135-05

Address	Phone	Height	Weight	Hair	Eyes	Avail. Ide
336 Fuller, St. Paul, MN 55103	Unknown	6'1"	180	Blk.	Brn.	None

Vehicle Make	License Number	Yr.	Color	Involved in Accident	Injuries Involved
1970 Chev.	EHK 066	79	Black/Blue	Yes ☒ No ☐	Yes ☐ No ☒

Registered Owner's Name	Address
Robert Thomas Henry	822 Newton Avenue North, Minneapolis

Drinking/Drugs Involved	Defendant	Victim	Tests Offered	Type of Test Given
Yes ☐ No ☒	☒	☐	Blood ☐ Breath ☐	Blood ☐ Breath ☐ None ☐

Implied Consent Invoked ☐	Additional Tests Advisory Given ☐	Operator	Results of Test

Describe Evidence/Property — Property Report No. —

Victim	DOB	Address	Phone
Reiss' Restaurant	---	6900 W. Lake Street	

Witnesses Names	Address	Age	Phone	Subpoena Required
See narrative (Continuation Report)				Yes ☐ No ☐
				☐ ☐

Records Checks Made	SLP	Henn Co. Warrants	D.L.	BCA	NCIC	MINCIS	Bail $
Attached	☒	☒	☒	☒	☒	☒	Fine ☐
Clear	☐	☐	☐	☐	☐	☐	RPR ☐

Miranda Warning Given:	Date	Time	Notations	Court Date
Yes ☒ No ☐	8/28/79	1000	By Sgt. Stimson	

Narrative

Defendant Dixon entered Reiss' Liquor Store with his hand underneath his shirt, pointing his forefinger at attendants and customers within, threatening that this was a stick-up and ordered everyone down on the floor. He was accompanied by Robert Henry, who was armed with a .38 caliber hand gun. Dixon and Henry emptied the two

Offense Cleared By: Arrest ☐ Exceptionally ☐ Case Unfounded ☐ Inactive (Not Cleared) ☐

26

ST. LOUIS PARK POLICE DEPT. MN0272100	DATE/TIME OF REPORT 8/22/79 1230	CONTINUATION REPO
	REPORTING OFFICER R/O Good	PAGE NO. 3 / COMPLAINT 79012005

OFFENSE ☐ ARREST/VIOLATION ☑ JUVENILE ☐ MOTOR VEHICLE ☐

of corrections, Ken Sandquist, 645-8171.

(28)

ST. LOUIS PARK POLICE DEPT.
MN0272100

Date/Time of Report
8/28/79 0515
Reporting Officer R/O
R. G. Metro

SUPPLEMENTARY REPC

Victim/Complainant Reiss'

Complaint No. 79012995

Offense ARMED ROBBERY

28

Date 8/27/79 Time 1820 Location Lake Street & Hampshire

I was working Operation Identification, and I was travelling on Minnetonka Boulevard at Texas when I heard dispatcher J. Lee indicate that an armed robbery of the Reiss' Liquor Store was now in progress. She then asked what units were responding, and I heard several indicate they were on the way. I was close, so I responded also. When I arrived, I also heard dispatcher Lee indicate that a customer that was in the liquor store indicated it was an armed robbery in progress to the bartender upstairs, who in turn called the Police.

Upon arriving, I stopped at Walker and W. Lake Street. I observed Officer Luse out in the middle of Lake Street and had a blue chevrolet in front of him. He had a black male subject on the ground and a white female subject that was still seated in the blue chevrolet. Officer Beltrand and Officer Ortner were covering the north end of Reiss'. Within a few minutes Officer Shook, Officer Korbel, Investigator Good, Sergeant Fitzgerald and a few other officers had arrived. Several patrons came running out of Reiss' restaurant and indicated that there was another black male inside who had a gun and had a hostage. At this time people began running out of Reiss' in great numbers. Some were running across the street. Some were stopping and gawking. Some were talking loudly. At this time three or four people come running up from Reiss' Liquor Store, which is located in the lower part of the building. I observed one, a Tom Peterson, who is a Hennepin County Deputy Sheriff and he indicated to me, in fact, that it was an armed robbery and that he was in the liquor store when it came down and that there was a black male with a gun who had an employee hostage in the liquor store area.

There was so much confusion with everyone screaming. At this time I positioned myself at the base of the liquor store and had observed Officers Shook and Korbel come around my back and then go down into the liquor store. They were going to position themselves in that area to check it out and seal it off in case the robbery was in the upper portion of the building and they would have an attempt to surprise him and release the hostage.

I observed Sergeant Fitzgerald, who was in charge of the scene. I advised him that Shook and Korbel were going down into the liquor store. Within a few minutes, Chief Setter arrived and took command. I then heard a customer state that the black male went back down into the basement with the hostage and the upstairs was clear. There were no more robbers upstairs. Hearing this I immediately ran down into the liquor store to assist Officer Shook and Officer Korbel. I vocally announced that I was coming in and Shook indicated that they thought they had a suspect trapped in one of the

rooms in back, and he vocally guided me back to the area. Officer Korbel was shouting commands for the suspect to come out and let the hostage come out unharmed, at which time the door leading into a small bathroom that's located in the northeast corner of the basement area came flying open and a white male came running out with his hands on his head yelling, "don't shoot, don't shoot, I'm the hostage." I immediately grabbed him and threw him on the ground out of the line of fire and then covered for him while he crawled to safety. Then I came back to Officer Shook, at which time a tall black male came out of the bathroom with his hands on his head and was immediately taken into custody by Officers Korbel and Shook.

He was immediately frisked and handcuffed, and Shook indicated there was no weapon on him. Officer Korbel then very carefully checking for another suspect, entered the bathroom and indicated that the weapon was in the toilet bowl. I then took the hostage, who identified himself now as Dennis Currier, 7819 Edgebrook Drive, outside because he was crying and in a state near shock. He kept shouting that the robber told him that he was going to kill him and that the robber knew that he was going to die and that the hostage was going to die with him. Officers Shook and Korbel remained in the basement area to preserve the scene of evidence. I then took Dennis Currier outside and was advised by him that another employee, Gerald L. Drinnin, 2742 Louisiana Avenue South, was also injured and was also pistol whipped by one of the two armed robbery suspects. Once outside, I knew Gerald and confronted him with such and he indicated that he was, in fact, pistol whipped on top of his head, and upon checking he had a large swelling on top of his head and a black and blue mark all around this large lump. He complained of severe headaches. Also, Dennis Currier, on the left side of his cheek by his mouth had a small laceration of about a quarter of an inch long and quite deep. He also indicated that the suspect smacked him in the face with the pistol. Both parties were taken outside and were kept in an area near the back door, and when the suspect was brought out both Drinnin and Currier indicated that that was the black male suspect that had hit them both and had threatened to kill them both and that had taken Dennis Currier hostage.

I informed Chief Setter that I had two injured victims that required medical attention, and he ordered me to take them to Methodist Hospital for treatment. At Methodist Hospital I spoke to Dennis Currier, and he advised me that he was on duty in the liquor store as an employee of Reiss' and with several customers in the store, at which time two black males came into the liquor store and walked immediately to the back portion of the store and turned around and came directly up to the front register counter. One black male came behind the register, and the other black male stood in front of the register and displayed a long barrelled revolver. He indicated that this was a robbery and for everyone to lay down. One male stayed behind the register and the other male suspect walked in toward the office and liquor storage area and was out of sight. A few minutes later this male came back and he had Gerald Drinnin, another employee in tow by the neck and he pushed him out into the liquor store proper and told him to lay down. He then came and wanted to know who was tge manager and came directly to Dennis Currier and put the gun up to Currier's head and said, "I'm going to kill you unless I get all the money." Currier said, "Okay. Come with me." He went back into the office area. Went to the safe and opened it and showed the suspect where the money was. At which time the suspect reached in and grabbed a white cloth bag of rolled coin and cash and

removed it from the safe. He and Currier came back out into the storage area. The suspect disappeared and Currier then looked toward a liquor storage cabinet and started running toward it to seek safety. All of a sudden the black male suspect came back running in from the liquor store and grabbed him by his hair and pulled him up the back steps toward the back door exit. When they got to the back door, Currier could see a lot of people out in the back lot and the black suspect also saw a police officer and he said, "The cops are here." At which time, Currier then broke loose and started running through the kitchen. The black male ran after him, grabbed him by the hair and almost pulled his hair out, pulling him to the floor and then started dragging him back down the steps. Currier then got up and walked on his own all the time in tow with the gun at his head. As soon as they got to the liquor storage area of the basement again, the black male said to Currier, "How do I get out of here?" Currier remember that in the bathroom there was a small window. He told this to the suspect and the suspect dragged him into the bathroom. It was at this point Officers Korbel and Shook had probably entered into the liquor storage area and Korbel seeing the door on the bathroom closed. Currier then indicated that the black male looked out the window and made some comment relative to there's a lot of police out there or a lot of guns out there, something to that effect. At which time he pointed the gun at Currier and stated, "I'm going to die, but you're going to die with me." Currier then as well as the suspect heard Officer Korbel yelling commands to come out with their hands up and there were several weapons pointed at them and if they made any false moves they would be shot: Currier then decided to take his chances and when the black male suspect stood up on the commode to reach up to open this basement window, he bolted away and busted toward the door coming running out with his hands up stating, "don't shoot, I'm a hostage." At which time he was grabbed by me and pulled to safety. Currier related to me that he was in fear of his life at all times while with the black suspect and that he had no doubt that if he had made the wrong move at any one particular time he would be dead.

I was also present with him when he positively identified the male brought out of the basement as his abductor and the suspect that also committed the armed robbery. I then spoke to Gerald L. Drinnin who works upstairs in the kitchen of Reiss'. He indicated that while working upstairs, he was sent down to the basement for something. He came down to the basement and walked to the beer/keg cooler. He was grabbed by the neck from behind and as he looked around he saw this black male with the gun pointed at him and the gun was pointed right at his head and the black male demanded, "where's the money." Drinnin indicated that he had just started working there and he did not know where any money was and begged for his safety. The black male stated that, "I'm desperate and I'll kill you if you don't tell me where the money is at." Drinnin indicated that he didn't know anything about the place because he had just started working there a few days and to please let him go. At this time the black male struck him on the top of his head with the gun and he recalled the lights going out and him falling face down onto the floor. He then recalled being dragged towards the liquor store at which time he came to and got up on his feet and the black male dragged him into the liquor store and pushed him forward and told him to lay down and don't move. It was at this time that Drinnin observed the black male then go behind the register counter and take Dennis Currier into the same liquor storage area that he had just come out of. I was also present with Drinnin when he too positively identified the black male being brought up out of the basement in custody as the party who had threatened him and

demanded money and struck him on the head with the firearm. Both these people were treated at Methodist Hospital, and I was advised upon the completion to bring them both back to Police Headquarters, at which time I did and they were turned over to Sergeant Stimson. I gave him a brief resume of what they had told me, and he in turn took statements from the two parties.

lh

(32)

T. LOUIS PARK POLICE DEPT.
MN0272100

Date/Time of Report	
8/27/79	2200 hrs.
Reporting Officer R/O	
Ortner #166	

SUPPLEMENTARY REPOR

VictIm/Complainant Reiss's Bottle Shop Complaint No. 79012995

Offense ROBBERY

Date _____ Time _____ Location _____

32

At approximately 1820 on 08/27/79, radio dispatcher advised that there was an armed robbery in progress at the Reiss's Bottle Shop, Walker and West Lake Street.

I arrived at the scene approximately 15 to 20 seconds after 3944, Officer Luse. Officer Luse stopped his vehicle by the entrance to the Bottle Shop from the southeast corner of the building. Idrove my vehicle to the corner of West Lake Street and Brownlow Avenue and parked partly blocking Brownlow. As I exited my vehicle, Officer Luse yelled a suspect had just fled to the back parking lot. I started running up Brownlow from West Lake Street. When I was a short distance from my vehicle, the suspect's vehicle, an older blue car, came squeeling from the back parking lot onto Brownlow. As the vehicle was entering the street, a bystander pointed to the vehicle and yelled, "That's them" or "That's the ones." I drew my service revolver, aimed at the driver, a black male later identified as one VADAAIN DIXON, ordering him to stop. The driver slouched down and intentionally drove his vehicle directly at me in an attemot to strike me with the vehicle. I dove to my right side firing one round from my weapon at the driver through the open window, as the vehicle just missed striking me. I was on the ground when I heard the vehicle screeching and the sound of an impact. I turned over and observed the suspect vehicle had been involved in an accident with the truck. I moved closer to the suspect vehicle where I was able to keep the suspect Dixon covered.

At this time I observed the second person in the back seat of the suspect vehicle. The second person in the vehicle is a female later identified as SHERYL DONLIN. At approximately this time Officers Beltrand, Shook, and Sgt. Fitzgerald had arrived at the scene. It was determined that there was another black male armed with a gun still inside the liquor store. Officer Luse, Sgt. Fitzgerald, and other officers contained the suspect vehicle and the two suspects inside the vehicle.

After the first two suspects were covered by other officers, I went to assist covering the rear of the store. Patrons were hiding by the building and were ordered away. Two or three officers had entered the building and were starting to check the basement area. A short time later radio transmission stated that the suspect had lost his hostage and that the suspect was cornered in the basement.

I entered in the back door and started down the stairs as the third suspect, later identified as ROBERT HENRY, was subdued by Officers Shook, Korbel, and myself. As I tried to handcuff the suspect, he kept squirming around and had to be physically restrained. I was able to handcuff the suspect, and he was placed in my police vehicle. Sgt. Fitzgerald arrived by my vehicle, and the suspect was removed to be searched for the yet unfound weapon. After the suspect

was searched, he was placed in my vehicle; Sgt. Fitzgerald read him the Miranda Warning at 1833. The suspect, Henry, kept ordering me to take him to jail "right now".

The scene was secured, and Officer Luse with suspect Dixon and I, with Henry, were going to start to the station. Officer Luse was held at the scene for a short time, and I arrived at the station a short time before Officer Luse. In the security garage suspect Henry started to struggle and was forced to the ground until assistance could aid me in moving him to the jail cell. The suspect Henry was placed in the men's center cell still in handcuffs until more assistance could be located. A short time later Officer Luse arrive d with suspect Dixon. I witnessed Officer Luse read Dixon the Miranda Warning in the police garage at approximately 1910. Dixon was taken to the female holding cell where he was searched by Officer Luse, who found a large amount of cash bills stuffed down suspect Dixon's pants. This money was property-carded at a later time. Dixon was placed in the center cell and handcuffs removed.

Officer Luse and I then removed Henry from the cell and removed the handcuffs and searched Henry's person. Nothing was found on Henry. He was placed back in the cell.

ky

(34)

ST. LOUIS PARK POLICE DEPT.
MN0272100

Date/Time of Report
8/28/79 1830
Reporting Officer R/O
Good

SUPPLEMENTARY REPO

Victim/Complainant Reiss' Restaurant Complaint No. 79012995

Offense ARMED ROBBERY

Date 8/28/79 Time 1830 Location Headquarters

On 8/27/79, I responded to an armed robbery in progress and received instructions to cover the west door of the restaurant, which I did. After it was confirmed that officers had located a suspect inside in the basement who was believed to be the only left in the establishment, I entered and assisted in the arrest of suspect who was later identified as Robert Thomas Henry.

I assisted in the collection of a sum of $350.00 in bills found on the west side of the building and with the collection of physical evidence by Hennepin County Crime Lab deputies C. Gorczyca and D. Strom. On 8/27/79, at 2100 defendant Cheryl Donlin was read her rights per Miranda, and she did not wish to make a statement at this time.

I sealed vehicle EHK 066 which had been towed to the Police Garage by D. Beltrand.

On 8/28/79, at 1415 hours, I presented a search warrant to the Honorable Judge E. Minenko, who signed same. I searched and inventoried vehicle subsequent to the warrant at 1600, 8/28/79 and evidence was property tagged, #6191. Officer Beltrand assisted.

lh

35

ST. LOUIS PARK POLICE DEPT.
MN0272100

Date/Time of Report
8/27/79 2315
Reporting Officer R/O
Luse

SUPPLEMENTARY REPORT

Victim/Complainant Reiss's Bottle Shop Complaint No. 79012995

Offense ARMED ROBBERY

Date 8/27/79 Time 1820 Location 6900 W. Lake Street

Responded to this call of an armed robbery in progress at Reiss's Bottle Shop from Highway 7 and Wooddale. Approximate response time was about 30 seconds. I parked my squad upon arriving just east of the stairway down to the Bottle Shop with the passenger side of the car facing the building. I immediately exited the squad, crouched behind the front end of it allowing myself to view the top of the stairway leading downstairs to the Bottle Shop. Almost simultaneously, suspect No. 1 (Vadaain David Dixon, 1/20/54) ran out of the stairway and down the path between Reiss's Bottle Shop and Super Radiator. I observed no weapon on Suspect No. 1 and had no suspect description at this point. While suspect No. 1 did ignore my command to stop, at approximately the same time Officer Ortner arrived, and I hollered out to him that the suspect had gone around behind the building. Officer Ortner proceeded to the intersection of Brownlow and Lake Street from my location. As I left the cover of my to pursue suspect No. 1, I glanced down the stairwell to the Bottle Shop. I observed suspect No. 2 (Robert Thomas Henry, 2/21/54) coming up the stairs with a revolver in his right hand. I immediately aimed my service revolver at suspect No. 2 and ordered him to drop his weapon. Suspect No. 2 responded instead by aiming his revolver towards me and stared directly at me for approximately 1½ seconds. Suspect No. 2 then turned abruptly and ran back down the stairs to the Bottle Shop. Because I could observe at least three persons lying spread-eagled on the floor of the Bottle Shop, I chose not to fire at Suspect No. 2 at this time.

When Suspect No. 2 re-entered the Bottle Shop, I saw him grabbing for one of these people on the floor pointing his revolver to this individual's head. Because indications were at this point that there was a hostage situation, I retreated to the southeast corner of the building.

From the southeast corner of the building, I glanced into the window of the Bottle Shop which faces Lake Street, and I observed No. 2 and the hostage moving towards the back of the Bottle Shop. Being unfamiliar with the interior layout, I felt at this time that it was possible that there was a lower level exit in the rear of the building. With this in mind, I began moving up Lake Street towards Officer Ortner's location. Several seconds passed, and I then heard tires squealing and yelling coming from the vicinity of the rear parking lot of Reiss's Restaurant on Brownlow. I immediately ran up the sidewalk towards Brownlow and while running, heard a shot fired from the same vicinity. At this point I had no idea who had fired this shot or what Officer Ortner's exact location was.

As I approached the intersection of Lake Street and Brownlow, a blue Chevrolet appeared eastbound on Brownlow approaching Lake Street. The vehicle's tires were squealing, and the rear end of the vehicle was fishtailing back and forth.

35

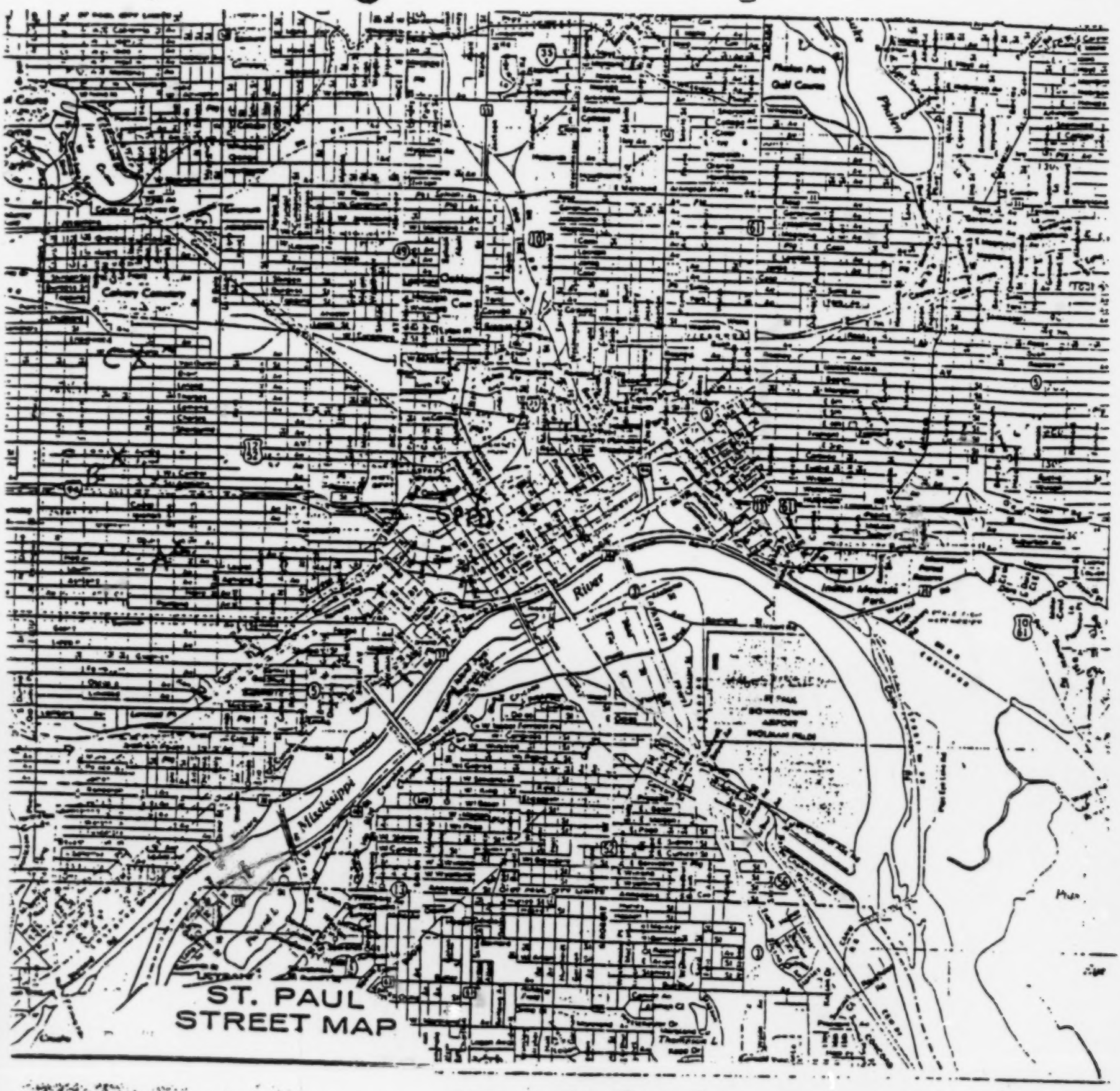
I immediately recognized the driver of this vehicle as Suspect No. 1. I also observed a second party in the passenger side rear seat of the vehicle slouching down. Because our information indicated at this time that there were only two suspects involved, I believed this individual to be Suspect No. 2. As the vehicle passed, I fired two shots at the vehicle, and the vehicle went to the intersection of Brownlow and Lake Street and collided with a pickup truck which had been southbound on Lake Street. Suspect No. 1 immediately extended his arms out the window with both hands open. The individual in the rear seat laid both arms across the front seat with palms open.

At this point I detected several other squad cars arriving on the scene.

At this time I was able to observe the passenger in the rear seat clearly and realized this was not Suspect No. 2, who was a Negro male; however, this passenger was a white female. I immediately alerted the other squads of the probability that Suspect No. 2 was still inside of the building with the hostage. I then apprehended and handcuffed Suspect No. 1 with assistance from Sgt. Fitzgerald. The white female, Suspect No. 3 (Sheryl Ann Donlin, 1/7/58) was also apprehended at this time.

When Suspect No. 2 was finally apprehended inside the restaurant, I placed No. 1 in the back of my squad car and transported him to our station. Upon arrival at our station I read No. 1 the Miranda Warning (1910 hours) which he acknowledged, stating he understood. Inside the station I removed No. 1's clothing and found $514.00 in currency tucked inside the front of his pants. The money was removed and property-carded No. 6186, and Suspect No. 1's handcuffs were removed and he was placed in a cell. No questions were asked of No. 1.

JL:ky



SPPD - St. Paul Police Department

A - 676 Dayton

B - 908 Aurora

C - 845 West Minnehaha

Exhibit C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-162

ROBERT E. CREIGHTON, JR. AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, PLAINTIFFS,

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS, RUSSELL ANDERSON, AND JOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US,
DEFENDANTS.

AFFIDAVIT OF WILLIAM JOHNSON

William Johnson, being first duly sworn under oath deposes and says:

1. That I am a Probation Officer with the Minneapolis Office of the United States Probation Department.

2. That I performed the presentence investigation on Vadaain Dixon in November of 1983. I am familiar with Sarisse Creighton, one of the plaintiffs in this matter, having known her in past years. In the course of the presentence investigations Sarisse Creighton submitted statements supportive of her brother, Vadaain Dixon.

3. I have read the affidavit of Sarisse Creighton dated May 30, 1984, and the affidavit of Iris Dixon dated May 30, 1984.

4. On November 9, 1983, I was informed by the Volunteers of America Halfway House that Vadaain Dixon had not returned from his furlough that day. I met with Wayne Rud and Mark Clem, Deputy U.S. Marshals that evening beginning at approximately 11:30 p.m. We went through all the information that I had concerning Vadaain Dixon including the addresses of all of his relatives. On a very early Thursday morning, November 10, 1983, I transmitted this information to the St. Paul Office of the Federal Bureau of Investigation.

5. On or about November 1, 1983, in the course of completing a presentence investigation on Vadaain Dixon I met with his wife Cheryl Dixon. Cheryl Dixon informed me at that time that she was residing at the home of Robert and Sarisse Creighton at 845 West Minnehaha Avenue in St. Paul. She informed me that the reason she was residing there was that it was convenient to Brooks Beauty School on University Avenue in St. Paul, where she was a student.

On or about November 1, 1983, in the course of doing the presentence investigation on Vadaain Dixon I met with Vadaain Dixon himself, who informed me that Cheryl Dixon was living with Sarisse and Robert Creighton at their house at 845 West Minnehaha Avenue. In the course of my doing the presentence investigation, Vadaain Dixon informed me by telephone that Cheryl Dixon was picking Vadaain Dixon up on a daily basis at the Volunteers of America residence by automobile so that Vadaain Dixon and Cheryl Dixon could spend his daily furloughs together.

6. Cheryl Dixon also informed me in the course of this meeting that she was using Sarisse Creighton's automobile and Iris Dixon's automobile as her principal means of transportation on a daily basis. She informed me that she used these automobiles to transport Vadaain Dixon to and from the VOA Halfway House. On Thursday, November 10, 1983, I informed Russell Anderson of the FBI of all of the above facts.

7. On Thursday afternoon, November 10, 1983, I met with Joe Cludy and Wayne Ruud, Deputy U.S. Marshals. The purpose of the meeting was to determine how we could find Vadaain Dixon. We decided to arrange a meeting with Iris Dixon, Vadaain Dixon's mother, at her home. I was included because I had previously known the family. That afternoon I telephoned Iris Dixon and arranged to meet her at her apartment at 5:30 p.m. A few minutes after I spoke to Iris Dixon, Sarisse Creighton called me and asked if I minded her attending the meeting. I said I did not mind. At approximately 5:30 p.m. I went to the home of Iris Dixon in St. Paul with Joe Cludy and Wayne Ruud. Sarisse Creighton was there. Russell Anderson was not informed of the fact of this meeting.

8. Iris Dixon, Vadaain Dixon's mother, is Caucasian and was originally a British citizen before she married an American citizen.

9. Our meeting with Iris Dixon and Sarisse Creighton began with Mrs. Dixon expressing her dismay at the fact that Vadaain Dixon had left the halfway house and had violated his bond. She was upset because the St. Paul paper had indicated that he was "armed and dangerous." At the sound of these words Sarisse Creighton became very agitated and began abusing the two Deputy Marshals. She said "you fuckin' honkies you're always looking for reasons to kill a nigger boy" and "get the fuck out of this house." She was very abusive. I grapped her by the hands to calm her down and she did, in fact, calm down.

10. Wayne Ruud informed Iris Dixon and Sarisse Creighton that the Marshal's Office had run computer checks to determine the makes, years and license numbers of all vehicles owned by relatives of Cheryl Dixon and Vadaain Dixon. The Marshals had then determined that all automobiles were accounted for in the Minneapolis/St. Paul area. The purpose of this check was to determine the possible description of any automobile that the Dixons

might have used to leave town. The meeting ended at approximately 7:00 p.m. I gave Iris Dixon and Sarisse Creighton my home telephone number so that they could reach me if they had word of Vadaain Dixon.

11. Sarisse Creighton is quick to anger and her demeanor verges on hysteria when she is angry. There was no reason for her to be angry with either Joe Cludy or Wayne Ruud on November 10.

12. I do remember having a conversation with Iris Dixon concerning her meeting with Russell Anderson in May 1983. All she told me was that she did not like Russell Anderson because she felt that Russell Anderson did not feel that she was telling the truth when she said she did not known where Vadaain Dixon was.

13. The only other converations I remember between myself and the Deputy Marshals and Iris Dixon and Sarisse Creighton on the evening of November 10 was that Sarisse Creighton asked why the marshals were involved in looking for Vadaain and not the FBI. The marshals explained that it was their duty to do so but that the FBI would also be involved in the search. No one informed her that the FBI would not be coming over to her house.

14. Based upon the information which I conveyed to Russell Anderson on November 10, it would have been most reasonable for him on November 11, 1983, following the bank robbery in St. Paul, to search for Vadaain Dixon at the homes of Iris Dixon and Sarisse Creighton. Their homes were close to the location of the bank robbery and Cheryl Dixon had been living with Sarisse Creighton ac-

cording to the information given to me by Vadaain Dixon and Cheryl Dixon. Cheryl Dixon had been using their automobiles on a daily basis.

/s/ WILLIAM J. JOHNSON
William Johnson,
Probation Officer
U.S. Probation Department

SUBSCRIBED and SWORN to before me
this 4th day of June, 1984.

/s/ E. ANN HERNANDEZ
(Notary Public)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-162

ROBERT E. CREIGHTON, JR. AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, PLAINTIFFS,

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS, RUSSELL ANDERSON, AND JOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US, DEFENDANTS.

AFFIDAVIT OF ROBERT CREIGHTON, JR.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Robert Creighton, Jr., being first duly sworn under oath, deposes and states:

That on Friday, November 11, 1983 I arrived home between 7:30 and 8:00 p.m. My wife, Sarisse, went upstairs and went to bed. My three daughters, whose ages are 10, 9 and 5 years, were at home with me that night. I was watching the television movie "J.F.K." when a searchlight flashed through the windows of my home. I walked to the door and looked outside and saw police officers coming

up so I stood at the door and watched. The officers did not knock at my door as stated by Russell Anderson. One told me to keep my hands up and then they simply entered the house without my permission and without showing any identification or any search warrant. I asked the officers for a search warrant and they said they didn't need one. I asked the officers to leave my house. They refused to do so. Some of the officers started searching my closets. I told them to stop. They didn't listen. I also asked the officers to put the guns away because there are small children in the house. They refused to do so. They never explained to me why they were there. I did learn much later when I was being taken to the police station in the squad car why they were there. However, before this point in time no one ever explained to me anything.

That I asked Sgt. DeNoma for a search warrant. He replied, "We don't have a search warrant. I don't need a search warrant; you watch too much TV." When the police officers came in the children began to scream hysterically. Apparently the children's screaming awoke Sarisse. She came running downstairs. One man kept asking me if I had a red and silver car. I told him I would show him my car. I went downstairs with the man in plainclothes following me. Sgt. DeNoma and another man were already downstairs searching when I came down. They were looking in my closets and room. Sgt. DeNoma stood between me and the door to the garage. I did not attempt to grab his shotgun from him. I did not assault him in any way. I was attempting to get to my garage door which he was standing by. I told him I wanted to show the man my car. Officer DeNoma then struck me. I fell back and hit my head on the wall.

That the officers apparently never entered the garage to view my car. The chain on the door between the garage and the basement was never removed. This would have been necessary for the police to enter the garage. That on

November 11, 1983 I knew very little about the activities of Cheryl and Vadaain Dixon. Specifically I knew very little of the details about their past criminal acts.

That Vadaain Dixon, to the best of my knowledge, had not been in our home since the previous winter. During the period between October 13 to November 9, 1983 when Vadaain was in the Volunteers of America home he was never in our house.

That Cheryl Dolan Dixon did reside with my family for a short period of time while Vadaain Dixon was in prison. I believe this was in the early part of the summer of 1983. After Cheryl ended this stay she did not have any means of entrance to my home. Cheryl Dolan Dixon did not reside in my home between October 13, 1983 and November 9, 1983.

That I have spoken to my neighbor, Robert Figgs. He had been questioned by the police on November 11, 1983. He said they asked him if he had seen a car with a yellow license plate. Mr. Figgs has also informed me that he is reluctant to become involved or give a statement.

That I was arrested for obstructing legal process on the night of November 11, 1983 and taken to jail. I was released next day and no charges have even been brought against me.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ ROBERT CREIGHTON JR.
Robert Creighton, Jr

SUBSCRIBED and SWORN to before
me this 30th day of May, 1984.

/s/ DENISE M. BOELTER
(Notary Public)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-162

ROBERT E. CREIGHTON, JR. AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, PLAINTIFFS,

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS; RUSSELL ANDERSON; AND JOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US.
DEFENDANTS.

AFFIDAVIT OF SARISSE CREIGHTON

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Sarisse Creighton, being first duly sworn under oath, deposes and states:

That I am a plaintiff in the above-entitle action.

That Vadaain Dixon is my brother.

That Vadaain Dixon has not been in my home since February of 1983.

That I had only seen my brother a few times between March, 1983 and November, 1983. That I saw him in March at a hotel in Minneapolis after he and Cheryl

Donlin Dixon were married. I saw him once in jail in May or June of 1983 when I visited him. I saw him one time on a Saturday when I rode with Cheryl from my mother's house to the halfway house that he was staying at in November. To my best recollection those are the times I had seen my brother between March, 1983 and November, 1983.

That Vadaain Dixon never visited our home when he was on furloughs from the halfway house I now know as Volunteers of America between October 13, 1968 and November 9, 1983.

That Cheryl Ann Donlin Dixon did not reside in our home from May, 1983 to November 9, 1983. She stayed for approximately two weeks in the summer of 1983. At that time, Vadaain Dixon was in prison waiting trial. She did not reside in our home at all between October 13 and November 9, 1983.

That on the evening of Friday, November 11, 1983 my husband and I returned home at approximately 7:30 p.m. to 8:00 p.m. Shortly after I went upstairs to my bedroom to go to sleep. A short time after I had fallen asleep I heard hysterical screams from my 10-year-old daughter. I also heard my husband hollering. I was undressed so I put on a robe and ran downstairs.

That I met a uniformed police officer on the stairway. He was pointing a shotgun at me. I said what the hell's going on. No one answered me. I heard my husband asking for a search warrant; no one answered him. My home was swarming with uniformed police officers and also other men in plainclothes. Many of them were carrying weapons.

That I had no clothing on under my bathrobe so I ran to the closet and grabbed my boots and a coat. I ran upstairs to get dressed. I could hear my husband trying to call his father. I heard a police officer telling him to get off the phone. I picked up the receiver in my bedroom and told my husband to hang up so they wouldn't beat him up and

that I would talk to his father. I told his father that the police were searching our home and we didn't know what for and to come over right away.

That I ran back downstairs at that point and the officers were screaming at my children telling them to "sit their damn asses down and to stop screaming". An officer then turned to me and said, "Why don't you make your damn kids sit on the couch and make them shut up?" At this time the officers were arguing with my husband and hollering at him. They were telling him they did not need a search warrant. I heard my husband ask them to put their shotguns away since there were small children in the home. They refused to do so. He also asked them to leave if they did not have a warrant. They refused to do so. Two officers went upstairs and I followed them. They stood in the doorway of each of our three bedrooms but never entered any one of them. They never looked in any closets, under any beds or behind any doors or in the bathroom. They did not search the third floor at all. At this point we did still not know what they were searching for.

That I then went back downstairs to the main floor with these officers where my husband, children and the other men were. My husband turned to one of the officers and said "I'll show you my car; it's in the garage."

That at that point my husband went downstairs. At least two uniformed officers preceded him and one man followed. My 10-year-old daughter followed behind them. I then heard them beating my husband. I thought they were killing him. My children started screaming hysterically and crying. My 10-year-old daughter screamed to another officer who was on the stairs or near the stairs "Please help me; they're beating my Dad!" Shaunda told me at that point an officer hit her in the arm. All throughout this period of time Russell Anderson and a uniformed police officer and I were in the front room. At no time did Russell Anderson go into the basement during the period.

I then attempted to call my mother; however, the officer kept kicking and grabbing the phone telling me "to hang up that damn phone".

That with all these occurrences I was in fear for my family's life. My children were all screaming and crying hysterically, my husband was being beat, my 10-year-old daughter appeared to be in shock. I told my children to run out the front door and go down to my friend's house four doors down for safety and not stop for anyone. As they ran out, a man in plainclothes ran after them. My neighbor, Roxanne Johnson, told me that he ran into her house and grabbed my 10-year-old daughter by the shoulders and shook her. My neighbor told him, "Can't you see she's in shock; leave her alone and get out of my house." After the agents and officers left my home my mother went to my neighbor's home and took my 10-year-old to the emergency room at Children's Hospital for an arm injury caused by the officers' rough handling of my daughter.

That as my children left the house, I ran to the back window. My house was completely surrounded by police officers and plainclothed agents. All my neighbors were in the street watching. I was extremely embarrassed and felt like a criminal. I opened my window and yelled to my neighbors to come in and help me. They responded that they couldn't because the officers wouldn't let them in and had locked the door. I told them to come to the front and I would let them in. I went out to the front door to let them in. I went to the front door to let them in. I went out to my neighbor and an officer slammed the door shut on me. I threw the door back open and told the police officer he could not lock me out of my own home. He said to me "Then get your ass in here and sit down." The uniformed police officers then were bringing my husband up the stairs. He was bleeding from his head and his mouth. He was handcuffed. I asked Sgt. DeNoma what he was being

arrested for. DeNoma said, "He hit me so I hit him." At that point I heard Russell Anderson say to my husband "I know you and Dixon robbed that bank." Anderson further said "We have proof that Dixon was here." I told him he was crazy and to prove it. Someone else said "You let Dixon use your car to rob that bank."

That at this point in time my mother entered our home. She identified one of the plainclothed agents as Russell Anderson. This is how my husband and I know the name of Russell Anderson. He never identified himself by name or as an FBI agent.

That next somebody said get him out of here now. They were referring to my husband, Robert Creighton. They took my husband down to the squad car. I then asked Russell Anderson again for a search warrant. Anderson turned to me with a very mean look and said "I don't need a damn search warrant when I'm looking for a fugitive." My father-in-law and I went down to the squad car where they held my husband. I told my father-in-law to follow them down to the station because they will beat him again while he is handcuffed and say he resisted arrest. I then asked the officer in the squad car for his badge number. He got out of the squad car, grinned at me and raised his billy club above my head as if he were going to hit me. I said "Oh, you're going to beat me because I asked for your badge number." He then lowered the club.

That at no point in time did any of the officers inform us why they were at our home. Only after Russell Anderson had told my husband that I know you and Dixon robbed the bank was I able to get some idea why the officers were in our home.

That on Thursday, November 10, 1983, at the home of my mother, Iris Dixon, at that time a United States Marshall and a federal probation officer, William Johnson, visited my mother's home. They asked questions about Vadaain Dixon and Cheryl Dixon. These federal officers

informed my mother and I that Vadaain had not returned to the halfway house on Wednesday, November 9, 1983. We informed them that we did not know of Vadaain's whereabouts. I asked them if the FBI would come around. They informed me that they would not. They also told us that all our cars had been checked out through a computer. They were okay. I assumed that this meant that Vadaain Dixon did not have them. Further, I believe that one of the marshalls returned to my home on Friday, November 11 for the following reason: When I came down the stairs somebody said there she is and apparently identified me. I thought I recognized this person as the marshall who had been at my mother's home the night before.

That a federal probation officer, William Johnson, has told me that the police did not have a positive identification of Vadaain Dixon when they searched my house on November 11, 1983. I have called the father of Cheryl Dixon, Richard Donlin. He lives in Edina, Minnesota. He told me that no FBI agents or police officers visited his home that evening. Further, Russell Anderson was aware that he lived in Edina and had been at their home in May of 1983. Also, I have been informed that no police officers or FBI visited the home of Tom Donlin, Cheryl's brother, who lives in Hugo, Minnesota. Cheryl Dixon and the Donlins are a white family.

That on the evening of November 11, 1983 the police officers and the agents also visited the home of my grandmother, Minnie Dixon. She is in her 70's and shared her home with a 87-year-old uncle. Amos McCann. McCann has since died. However, at that time he was recuperating in her home from a heart attack.

That finally, I was terrified that evening when the police came to my home. All the police officers were white and my family and I are black. These racial differences in-

creased my fears. I also feel my family had been the victim of racial discrimination because the Donlin's homes were not visited by the FBI or the police that evening.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ SARISSE CREIGHTON
Sarisse Creighton

SUBSCRIBED and SWORN to before
me this 30th day of May, 1984.

/s/ H. E. KELLY
(Notary Public)- Ramsey County

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-84-162

ROBERT E. CREIGHTON, JR. AND SARISSE CREIGHTON, HUSBAND AND WIFE, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, SHAUNDA CREIGHTON AND TIFFANY CREIGHTON, PLAINTIFFS,

v.

THE CITY OF ST. PAUL, A MUNICIPAL CORPORATION; OFFICER JOHN DENOMA; OFFICER DANIELS, OFFICER ASHTON, OFFICER GELAO, OFFICER SNYDER, AND OFFICER STEFFAN, WHOSE TRUE FIRST NAMES ARE UNKNOWN TO PLAINTIFFS; RUSSELL ANDERSON; AND JOHN DOE, RICHARD ROE, AND MICHAEL MOE, WHOSE TRUE NAMES ARE UNKNOWN TO US, DEFENDANTS.

AFFIDAVIT OF IRIS DIXON

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Iris Dixon, being first duly sworn under oath, deposes and states:

That to the best of my recollection these are the events that transpired the evening of November 11, 1983.

That FBI agent Russell Anderson, accompanied by numerous police officers armed with rifles or shotguns (I cannot distinguish the difference), arrived at my residence at approximately 8:00 p.m. Agent Anderson was standing

at my front door with other officers holding rifles/ shotguns. I recognized Russell Anderson immediately from previous contact.

That he mumbled something about a warrant for my son Vadaain's arrest and started into my house without permission. I asked if he had a search warrant and he replied that he did not need one.

That I was terrified at the sight of so many officers and guns, fearful that my son Jamie, who was here with me at the time or myself would get hurt if I resisted their entering my home.

That upon entering one uniformed officers went to my back door and admitted more police officers who also were armed with rifles/shotguns. The officers ran through my home opening closet doors and thoroughly searching each room. It really was a nightmare. I am deathly afraid of firearms, and told everyone present it was not necessary to bring guns into my home. I started crying.

That the officers (all Caucasian) acted as though I was a criminal and deserved no consideration whatsoever, with the exception of one uniformed officer who did speak kindly to me. During all the confusion Russell Anderson told us he was investigating a bank robbery that had occurred earlier that afternoon, and that Vadaain was a suspect. Anderson question us about the whereabouts of Vadaain and his wife, Cheryl; neither of us knew. Anderson also questioned about other family members. Jamie and I both answered because we knew none of the family had anything to hide.

That I personally am afraid of Russell Anderson due to an implied threat he had made on another occasion a few months previously. To the best of my recollection it was in May, 1983. Agents came to my home and questioned me about Vadaain's activities, of which I knew nothing. He also questioned me about Vadaain's associates, especially one named Billingsly. I had never heard the name before.

Anderson showed me a picture, insisting I did know him. I explained I did not know any of his associates, especially the inmates at Stillwater Prison. He told me to have James call him. He implied if the family did not cooperate with him things could be made very uncomfortable. I cannot recollect his exact statement but that was the general gist. The implication left me with a chill that I cannot forget. I mentioned this incident to Mr. William Johnson, the federal probation officer who handled Vadaain's pre-sentence investigation quite a while before the events of November 11, 1983.

That during the evening of November 11, Agent Anderson questioned Jamie about his legal address on his driver's license, which happens to be the home of Grandmother Minnie Dixon. I asked Anderson not to bother her because she is in her seventies and shares her home with her 87-year-old uncle who had just come home from the hospital and was recuperating from a heart attack. Agent Anderson just smiled. All the law enforcement people then proceeded to leave my residence, leaving behind the mess they had created during their search. I immediately called Jamie's grandmother, explained the series of events, advised her to let Anderson in (I knew by his smile he would go there) and to cooperate fully with him. I did not want either Minnie or her uncle to have a heart attack.

That shortly afterwards a phone call came from my daughter, Sarisse Creighton. She was hysterical, telling me the police were in her home, they had guns, had beaten her husband and that they also hit my 10-year-old granddaughter, Shaunda. Jamie and I immediately went to her home. Squad cars were all over the block; upon entering the house it was pandemonium. My son-in-law was handcuffed, with a policeman on each side of him. There was blood on his shirt. They were standing facing the front door at the top of the stairs in the passage leading from the kitchen area. I went over to them and said, "Oh my God,

what is going on here." One of the officers holding Robert told me he was under arrest. I asked why he was being arrested as he was not a criminal and probably would lose his job. The officer replied, "He hit me so I hit him." I then went over to Anderson who was standing in the front room to the right of the front door and asked him why he was doing this to my family when he should be out catching criminals. He replied, "That is what I am doing." He wore that same smile on his face.

That one man in civilian clothes, shorter than the other officers, took me aside and told me my granddaughter had not been hit, her mother was just saying that. That after the police left with Bobby, Shaunda returned home (she had run to the neighbor's house for refuse) still very upset, crying and complaining of her arm hurting, telling me that a policeman had hit her. I suggested to Sarisse that possibly Shaunda should see a doctor. Shaunda did not feel any better so I took her to Children's Hospital in St. Paul approximately an hour later. Her mother was in no condition herself to attend to this matter.

That I only saw Vadaain a couple of times during the time he was in the halfway house; that was on weekends. I work until 5:00 p.m. and do not arrive home until after 5:30 p.m. The last time I saw Vadaain was the previous Sunday. He came to my home as I was leaving to visit Minnie Dixon's uncle in the hospital.

That Mr. William Johnson of the federal probation department, accompanied by two federal marshalls, came to my home (I think it was November 10) to discuss Vadaain's nonreturn to the halfway house, and left satisfied I was telling the truth that I did not know the whereabouts of Vadaain or Cheryl. Almost six months have passed. I do not sleep soundly at night, waking up if

a car door slams, worrying constantly if Agent Anderson and the police are ready to re-enact the events of November 11.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ IRIS DIXON
Iris Dixon

SUBSCRIBED and SWORN to before
me this 30th day of May, 1984.

/s/ CHERYL L. BRANNON
(Notary Public)

AFFIDAVIT OF ROBERT CREIGHTON, SR.

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Robert Creighton, Sr., being first duly sworn under oath, deposes and states:

That I am the father of Robert Creighton, Jr.

That on November 11, 1983 Sarisse Creighton, Robert's wife, called me and said the police were at her house and to come over there as quickly as possible. Before I could get dressed she called back and said that the police were beating up Robert. When I got there I entered the house and a plainclothed policeman, who I now know is Russell Anderson, was inside the house standing in the living room. I saw my son near the stairs; he was handcuffed and bleeding from the mouth. I asked Mr. Anderson if he had a search warrant. He told me that they didn't need one.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ ROBERT CREIGHTON, SR.
Robert Creighton, Sr

SUBSCRIBED and SWORN to before me this 30th day of May, 1984.

/s/ DENISE M. BOELTER
(Notary Public)

In the Supreme Court of the United States

No. 85-1520

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET UX., ET AL.

ORDER ALLOWING CERTIORARI. Filed June 30, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20528

Supreme Court, U.S.
FILED
AUG 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1520

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

BARBARA L. HERWIG
RICHARD A. OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a law enforcement officer's immunity from monetary liability under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), may be defeated by a showing that the general legal standard governing the officer's conduct was clearly established at the time of the relevant events, or whether the officer's immunity may only be overcome if he reasonably should have known that his particular conduct violated the applicable constitutional standard.

PARTIES TO THE PROCEEDING

The petitioner is Russell Anderson, a special agent of the Federal Bureau of Investigation. The respondents are Robert E. Creighton, Jr., and Sarisse Creighton, the plaintiffs in this case, who brought suit on their own behalf and on behalf of their children, Shaunda Creighton and Tiffany Creighton.

The City of St. Paul and St. Paul police officers John J. DeNoma, Kevin T. Daniels, Robert C. Ashton, John J. Gelao, William A. Snyder, and Jerome P. Stephan were defendants in the district court, but their cases were remanded to state court and they did not appear in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Summary of argument	10
Argument:	
The court of appeals erroneously deprived petitioner of his immunity defense	13
A. A government official is entitled to immunity from damages liability unless he reasonably should have known at the time of the relevant events that his particular conduct violated the Constitution	15
B. The rule adopted by the court of appeals would subject law enforcement officers to damages liability in the situations where immunity is most appropriate	25
C. This case should be remanded to allow the courts below to apply the correct immunity standard	30
Conclusion	34

TABLE OF AUTHORITIES

Cases:

Bailey v. *Turner*, 736 F.2d 963	22
Bass v. *Wallenstein*, 769 F.2d 1173	22
Beck v. *Ohio*, 379 U.S. 89	26
Bilbrey v. *Brown*, 738 F.2d 1462	22
Bivens v. *Six Unknown Named Agents*, 403 U.S. 388	6, 13, 21, 28
Butz v. *Economou*, 438 U.S. 478	23
Davis v. *Scherer*, 468 U.S. 183	17, 18
Dorman v. *United States*, 435 F.2d 385	7, 10, 27
Draper v. *United States*, 358 U.S. 307	26

Cases—Continued: Page

Evers v. *County of Custer*, 745 F.2d 1197 22
Floyd v. *Farrell*, 765 F.2d 1 21
Franks v. *Delaware*, 438 U.S. 154 33
Fujiwara v. *Clark*, 730 F.2d 357 23
Harlow v. *Fitzgerald*, 457 U.S. 800 ..... *passim*
Hill v. *California*, 401 U.S. 797 33
Hobson v. *Wilson*, 737 F.2d 1, cert. denied, No. 84-1139 (Mar. 25, 1985) 22
Illinois v. *Gates*, 462 U.S. 213 ..... 26, 32-33
LeSavage v. *White*, 755 F.2d 814 22
Llaguno v. *Mingey*, 763 F.2d 1560 28
Malley v. *Briggs*, No. 84-1586 (Mar. 5, 1986) ..... *passim*
Michigan v. *DeFillippo*, 443 U.S. 31 33
Mitchell v. *Forsyth*, No. 84-335 (June 19, 1985) 13, 14, 16, 17
Pierson v. *Ray*, 386 U.S. 547 ..... 24, 25, 29
Procunier v. *Navarette*, 434 U.S. 555 ..... 23, 25
Scheuer v. *Rhodes*, 416 U.S. 232 23
Schneckloth v. *Bustamonte*, 412 U.S. 218 29
Stone v. *Powell*, 428 U.S. 465 28
Terry v. *Ohio*, 392 U.S. 1 ..... 26, 28
Trejo v. *Perez*, 693 F.2d 482 23
United States v. *Baldacchino*, 762 F.2d 170 27
United States v. *Hultgren*, 713 F.2d 79 28
United States v. *Jacobsen*, 466 U.S. 109 26
United States v. *Kulcsar*, 586 F.2d 1283 ..... 7, 27, 32
United States v. *Leon*, 468 U.S. 897 ..... 20, 21, 30
United States v. *Manfredi*, 722 F.2d 519 28
United States v. *Martinez-Gonzalez*, 686 F.2d 93 27
United States v. *Santana*, 427 U.S. 38 27
United States v. *Sharpe*, No. 83-529 (Mar. 20, 1985) 26
United States v. *Shye*, 492 F.2d 886 27
United States v. *Titus*, 445 F.2d 577, cert. denied, 404 U.S. 957 28
Vance v. *North Carolina*, 432 F.2d 984 27
Warden v. *Hayden*, 387 U.S. 294 27
Welsh v. *Wisconsin*, 466 U.S. 740 27
Wood v. *Strickland*, 420 U.S. 308 ..... 23, 24, 25
Zook v. *Brown*, 748 F.2d 1161 22

Constitution and statutes: Page

U.S. Const.:

Amend. I 22
Amend. IV ..... *passim*
Amend. VIII 23
Amend. XIV (Due Process Clause) 18
42 U.S.C. 1983 ..... 6, 8
42 U.S.C. 1985 ..... 6, 8

Miscellaneous:

LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. Mich. J.L. Ref. 417 (1984) 28
1 W. LaFave, *Search and Seizure* (1978) 26, 30, 33

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1520

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 766 F.2d 1269. The opinion of the district court (Pet. App. 18a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1985. A petition for rehearing was denied on October 15, 1985 (Pet. App. 27a). On January 4, 1986, Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including

March 14, 1986. The petition was filed on that date and was granted on June 30, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

1. At approximately 3:30 p.m. on November 11, 1983, the Minnesota Federal Savings and Loan in St. Paul, Minnesota, was robbed by a man holding a gun. Petitioner, a special agent of the Federal Bureau of Investigation (FBI), was informed of the robbery and arrived at the bank at approximately 4:30 p.m. to begin his investigation. Together with two other FBI agents and several officers of the St. Louis Police Department, petitioner interviewed eyewitnesses to the robbery and gathered other evidence. Petitioner obtained a description of the robber from the bank tellers and learned from others in the neighborhood that the robber had used a getaway car that was burgundy or maroon and silver, or possibly a darker color, and that the car might have been a Buick. Pet. App. 19a; J.A. 17-18.

Petitioner stated in an affidavit filed in this action that "[b]y 6:30 p.m. * * * [he] began to suspect that the robber was Vadaain David Dixon" (J.A. 18). He based his conclusion on several factors. First, the description of the bank robber supplied by the tellers "was identical to Dixon's height, weight, build, race, hair and complexion" (*ibid.*). Second, Dixon had a history of committing armed bank robberies. Earlier in the same year, Dixon had been indicted by a federal grand jury for crimes related to seven bank robberies; Dixon subsequently pleaded guilty to four of these robberies, two of which took place in the Minneapolis-St. Paul area. Dixon admitted that he had used a handgun in some of the

bank robberies. Pet. App. 19a-20a; J.A. 18. Third, petitioner knew that Dixon was "at large and a federal fugitive" (J.A. 19). Following his guilty plea in connection with the bank robbery charges, Dixon had been released on bond pending the completion of the presentence investigation. As a condition of his release Dixon was required to reside at a Volunteers of America residence, but was permitted to leave the residence on daily furloughs. He had failed to return from his furlough on November 9, 1983, two days prior to the bank robbery, and a warrant for his arrest had been issued. Petitioner was aware of all of this information because he had conducted the investigation of the other bank robberies committed by Dixon. Pet. App. 19a-20a; J.A. 18-19.

Petitioner left the bank at approximately 6:30 p.m. to prepare a photographic display of potential suspects to show to the bank tellers who had seen the robber. Between 7:30 p.m. and 8:00 p.m. each of the two tellers independently identified Dixon as the bank robber by selecting his photograph from a 12-photo display. Pet. App. 20a; J.A. 19.[1]

Petitioner next met with officers of the St. Paul Police Department and concluded that "[b]ecause of Vadaain Dixon's propensity for violence" he should be arrested "as swiftly as possible" (J.A. 20). In addition to his knowledge of Dixon's history of armed bank robberies, petitioner knew that Dixon had participated in a 1979 liquor store robbery in which an accomplice pistol-whipped the store's employees and customers and took a hostage at gunpoint. Dixon himself almost ran over a police officer in an attempt

---

[1] Several days later, an accomplice to the robbery was arrested and gave a statement naming Vadaain Dixon as the bank robber. Pet. App. 19a n.1; J.A. 18.

to escape from the scene of that crime. And, of course, a gun had been used in the bank robbery that was under investigation. Pet. App. 20a; J.A. 19-20.

Petitioner and the police officers proceeded to the home of Dixon's mother, Iris Dixon. Her house was close to the police station and the bank, and the officers knew that Dixon's brother, James Dixon—who had helped petitioner escape after an earlier bank robbery—was staying with his mother. Pet. App. 20a & n.2; J.A. 20. The officers searched the house, but did not find Vadaain Dixon.[2] James Dixon supplied the officers with the addresses of his grandmother and other siblings and told the officers that his sister and brother-in-law, respondents Sarisse Creighton and Robert E. Creighton, Jr., owned a red or burgundy Oldsmobile. Pet. App. 20a; J.A. 20-21.

Petitioner believed that Cheryl Ann Donlin Dixon, Vadaain Dixon's wife, was residing with the Creightons. Cheryl Dixon previously had admitted that she drove the getaway car in two of the bank robberies committed by Vadaain Dixon. She had been arrested in connection with those robberies and released on bond pending her trial. The probation officer conducting the presentence investigation of Vadaain Dixon had informed petitioner that Cheryl Dixon stated that she was living with respondents and sometimes used respondents' automobile to pick up Vadaain Dixon at the Volunteers of America residence. The probation officer further reported that Vadaain Dixon confirmed that his wife was living at respondents' home. Pet. App. 19a, 20a-21a; J.A. 18, 21, 38-39. Either just be-

---

[2] Petitioner stated in his affidavit that Iris Dixon and James Dixon consented to the search of the house (J.A. 20); Iris Dixon did not indicate in her affidavit whether she consented to the search (see J.A. 53-54).

fore or immediately after his conversation with James Dixon, petitioner confirmed by computer the fact that respondents owned a burgundy or maroon Oldsmobile, an automobile that resembled the getaway car described by witnesses to the bank robbery. Pet. App. 21a; J.A. 21.

The officers next stopped at the home of Minnie Dixon, Vadaain Dixon's grandmother, which was located on the route between Iris Dixon's house and respondents' house. Minnie Dixon consented to a search of her home; the officers again did not find Vadaain Dixon. Pet. App. 21a; J.A. 21.

Petitioner and the police officers arrived at respondents' home at 8:40 p.m. Robert Creighton did not consent to a search of his home, but the officers nonetheless entered and searched for Vadaain Dixon. Pet. App. 21a; J.A. 21-22, 43-44. Some of what transpired during that search is in dispute, but several facts are uncontested.[3] During the course of the search, Sarisse Creighton and her children became quite distraught (Pet. App. 2a-4a, 21a). Robert Creighton was struck and injured by a St. Paul policeman, arrested for obstructing legal process, and released the following day without being charged with an offense (*id.* at 3a-4a, 22a). Petitioner had nothing to do with the incident in which Robert Creighton was injured (*id.* at 22a, 24a n.4).[4] And neither Vadaain Dixon nor Cheryl Dixon was found at respondents' home.

---

[3] Compare J.A. 22-23 (affidavit of Russell Anderson) with J.A. 44-45 (affidavit of Robert Creighton, Jr.); J.A. 55-56 (affidavit of Iris Dixon); J.A. 47-48 (affidavit of Sarisse Creighton).

[4] According to petitioner, Robert Creighton provoked a St. Paul police officer by attempting to grab his weapon (J.A. 22-23). According to Robert Creighton, the police officer's

2. Respondents subsequently commenced this action in Minnesota state court against petitioner and other defendants alleging that the officers' warrantless entry into respondents' home violated the Fourth Amendment.[5] Respondents sought damages under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971); 42 U.S.C. 1983 and 1985; and state tort law. J.A. 3-15. Petitioner removed the action to federal district court and moved for summary judgment on the ground that he was entitled to immunity from liability for damages under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Petitioner contended that his warrantless entry into respondents' home did not violate respondents' clearly established constitutional rights because the relevant case law did not indicate that his conduct was unconstitutional.

The district court granted summary judgment in favor of petitioner, holding that petitioner's conduct did not violate the Fourth Amendment (Pet. App. 18a-26a). The court found that petitioner's suspicion that Vadaain Dixon had committed the bank robbery was "reasonable and justified in light of the description of the robbery given by witnesses, Dixon's past robberies and his recent fugitive status, and the selection of Dixon's photo from a photo lineup by the two tellers" (*id.* at 23a).

---

assault was unprovoked (J.A. 44). Since the question before this Court involves only petitioner's entitlement to immunity, and the district court found that respondents failed to come forward with any facts establishing a conspiracy between petitioner and the St. Paul police officers (Pet. App. 26a), the facts concerning the conduct of the local police officers are irrelevant here.

[5] In addition to petitioner, the complaint named as defendants the City of St. Paul, several identified St. Paul police officers, and several unidentified FBI agents (J.A. 4-5).

The court further concluded that petitioner had probable cause to believe that Dixon was at respondents' home. It noted that Vadaain Dixon's probation officer informed petitioner that he had learned from both Vadaain Dixon and Cheryl Dixon that Cheryl Dixon was living with respondents and using their automobile; that petitioner was aware that Cheryl Dixon previously had been arrested for acting as Vadaain Dixon's accomplice; and that respondents' automobile resembled the description of the car used in the bank robbery (Pet. App. 23a).

The district court also found that "exigent circumstances existed to justify [petitioner's] search at [respondents'] residence without a warrant" (Pet. App. 23a). The court applied the six-factor test originated in *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc), and approved by the Eighth Circuit in *United States* v. *Kulcsar*, 586 F.2d 1283 (1978). It stated (Pet. App. 24a & n.4) that (1) "[a] grave offense was involved here, armed robbery"; (2) "the suspect was reasonably considered to be armed and dangerous based on his past record and fugitive status"; (3) petitioner had probable cause to believe that Vadaain Dixon committed the bank robbery; (4 petitioner had probable cause to believe that Vadaair Dixon was located at respondents' residence; (5) "[t]here was a likelihood that Vadaain Dixon would escape if not swiftly apprehended in that he had just jumped bond, had a vehicle, and money from the robbery to finance his flight"; and (6) "[t]he initial entry into [respondents'] home was peaceful," and the alleged violent acts—in which petitioner was not alleged to have been involved—did not occur until after the officers' entry. The court also noted that the warrantless entry was justified by peti-

tioner's reasonable need to prevent the destruction of evidence and by the fact that petitioner was in "hot pursuit" of Vadaain Dixon (*id.* at 24a-25a).

The court observed that its determinations were not affected by respondents' offer to prove certain facts through discovery because "the four facts listed in the offer of proof [presented] no barrier to summary judgment here" (Pet. App. 25a n.5).[6] Since petitioner's conduct did not violate the Fourth Amendment, the district court concluded that he was entitled to immunity from damages liability.[7]

3. The court of appeals reversed and remanded the action for trial (Pet. App. 1a-17a). It found that "[t]he record reveals numerous unresolved factual controversies on the issues of probable cause and exigent circumstances which should be resolved by

---

[6] Respondents offered to prove that a newspaper reported that the FBI had stated that a car was not observed leaving the scene of the bank robbery, that the FBI had provided the newspaper with a description of the bank robber different from the description contained in petitioner's affidavit, that police officers had asked one of respondents' neighbors whether he had seen a car with license plates of a color different from those on respondents' car, and that the FBI did not search the home of Cheryl Dixon's father. Pet. App. 9a, 25a n.5.

[7] The district court further concluded that summary judgment was appropriate on respondents' claim against petitioner under 42 U.S.C. 1983 because "Section 1983 requires that the defendant acted under color of state law" but petitioner "was a federal officer acting under federal law. [Respondents] failed to allege any conspiracy to tie [petitioner] in with the non-federal officials, and no facts have been advanced to support such an allegation" (Pet. App. 26a). The court rejected respondents' claim under 42 U.S.C. 1985 because they "failed to allege the requisite class-based animus" (Pet. App. 26a). Finally, the district court remanded the claims against the remaining defendants to state court (*ibid.*).

the jury after [respondents] have been given the opportunity for reasonable discovery" (*id.* at 7a (footnote omitted)). With respect to probable cause, the court found that there was an issue of fact "as to whether [respondents'] automobile matched the description of the car used in the robbery" (*id.* at 9a). The court stated that the description of the getaway car was ambiguous and noted that respondent had sought discovery in order to establish that the police were not sure of the description of the automobile (*id.* at 8a-10a).

The court further concluded that petitioner could not rely upon the information concerning Cheryl Dixon's whereabouts to establish probable cause because (1) other evidence in the record indicated that Cheryl Dixon was not living with respondents (Pet. App. 11a), (2) petitioner's information concerning Cheryl Dixon was "unreliable double hearsay" (*ibid.*), and (3) petitioner's information did not show that Cheryl Dixon was living with respondents after November 1 (*id.* at 12a).

The court of appeals also rejected the district court's conclusion that exigent circumstances justified petitioner's warrantless entry into respondents' home. It found the "hot pursuit" exception to the warrant requirement inapplicable because "no evidence in the record supports a claim that [petitioner] was in 'immediate or continuous pursuit' of Vadaain Dixon or that [petitioner] was involved in 'some sort of chase' " (Pet. App. 13a (citations omitted)). The court of appeals concluded that the warrantless entry was not justified by a fear of destruction of evidence because petitioner's affidavit did not reveal any concern that evidence might be destroyed. Finally, the court found that summary judgment regarding the

existence of exigent circumstances under the *Dorman* test was precluded by factual disputes relating to the likelihood that Vadaain Dixon was present in respondents' home, the possibility that Dixon might escape in the time necessary to obtain a warrant, and whether petitioner's entry into the home was peaceable. Pet. App. 13a-15a.

The court of appeals next briefly addressed petitioner's entitlement to qualified immunity. The court explained that " 'if the law was clearly established, the immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct' " (Pet. App. 16a (quoting *Harlow*, 457 U.S. at 818-819)). Then, adverting to its earlier discussion regarding the lawfulness of petitioner's actions, the court stated that "[respondents'] fourth amendment rights and the 'exigent circumstances' doctrine were 'clearly established' " at the time of petitioner's entry into respondents' home (Pet. App. 16a) and that "[petitioner] has cited no persuasive reason why he could reasonably have been unaware of this clearly established law" (*id.* at 17a). Accordingly, without undertaking to decide whether petitioner's own actions were clearly unlawful under well-established law, the court of appeals held that petitioner was not entitled to qualified immunity.

SUMMARY OF ARGUMENT

In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), this Court concluded that a government official may not be held liable in damages for his unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known" (457 U.S. at 818). The question in this case is whether an official should

lose the immunity conferred under *Harlow* simply because the general legal principle defining the plaintiff's constitutional rights was "clearly established" at the time of the conduct in question.

It is well settled that a government official may be deprived of his immunity from damages liability only if he should have known, on the basis of the relevant case and statutory law, that the challenged conduct violated the Constitution. *Harlow* itself framed the inquiry as whether the official violated clearly established "constitutional rights," not whether his conduct was governed by a settled legal principle, and emphasized that immunity is available so long as the official's conduct is objectively reasonable. The Court reaffirmed last Term in *Malley* v. *Briggs*, No. 84-1586 Mar. 5, 1986), that an immunity defense may be defeated only if "a reasonably well-trained [official] in [the defendant's] position would have known" that his conduct violated the Constitution (slip op. 9).

A plaintiff might, in some circumstances, be able to overcome an official's immunity defense simply by showing that a settled legal principle governed the official's conduct. If the legal principle established a bright-line rule sufficient to inform a reasonable official that his particular conduct violated the Constitution, immunity would not be appropriate. But many, if not most, legal standards do not establish such bright-line rules. They instead prescribe general principles, with the lawfulness of an official's conduct in a particular case depending upon the specific facts of that case. This sort of general legal principle—standing alone—would not in any way enable a government official to determine whether his conduct was permitted under the Constitution. The existence of such a general principle of law, therefore, cannot deprive

a government official of his immunity. The official's entitlement to immunity instead depends upon whether a reasonable official, reviewing the cases in which the legal principle had been applied, would have known that the challenged conduct violated the plaintiff's constitutional rights.

The court of appeals' contrary view—that immunity should be withdrawn if the relevant legal standard was clearly established at the time of the challenged conduct—would drastically reduce the protection from immunity afforded to government officials; the implications of that rule are especially dramatic with respect to the immunity afforded to law enforcement officers. Many of the day-to-day duties of law enforcement officers are governed by settled, but extremely general, Fourth Amendment principles such as, for example, the "reasonable suspicion" standard applicable to investigatory stops, the "probable cause" standard applicable to searches and arrests, and the "exigent circumstances" standard applicable to warrantless entries into an individual's home.

Under the rule adopted by the court of appeals, the existence of such general standards would eliminate immunity for law enforcement officers in almost every lawsuit seeking damages for a violation of the Fourth Amendment. The officer would be held to a standard of perfection; if he incorrectly predicted the manner in which a court later resolved some complex Fourth Amendment question, he would be subject to monetary liability on the ground that the general legal principle governing that question was clearly established. This Court should reject the unjustified limitation upon official immunity imposed by the court below and reaffirm that a law enforcement officer's entitlement to immunity depends solely

upon whether the officer reasonably should have known that his particular conduct violated the Constitution.

ARGUMENT

THE COURT OF APPEALS ERRONEOUSLY DEPRIVED PETITIONER OF HIS IMMUNITY DEFENSE

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that an individual may in some circumstances recover money damages from a federal law enforcement officer for injuries that he suffers as a result of the officer's violation of his Fourth Amendment rights. The Court in *Bivens* reserved the question whether a law enforcement officer might be "immune from liability by virtue of [his] official position" (403 U.S. at 397), but the Court's subsequent decisions have made clear that law enforcement officers "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 5, 7-9; *Mitchell* v. *Forsyth*, No. 84-335 (June 19, 1985), slip op. 18. The standard turns upon the "objective reasonableness of [the] official's conduct": a law enforcement officer is entitled to immunity unless he could "fairly be said to 'know' that the law forbade [his] conduct" (*Harlow*, 457 U.S. at 818).

A government official's immunity defense frequently may be upheld on the ground that the general legal principle defining the constitutional right asserted by the plaintiff was not "clearly established" at the time of the alleged infringement of that right by the government official. For example, in *Mitchell* v.

Forsyth, supra, the plaintiff claimed that former Attorney General Mitchell violated his Fourth Amendment rights by authorizing a warrantless wiretap designed to gather information regarding a domestic threat to national security. This Court analyzed the case law relating to the constitutionality of such wiretaps and concluded that "[t]he legality of the warrantless domestic security wiretap Mitchell authorized in November 1970 was, at that time, an open question" (slip op. 23). Since it could not be said that former Attorney General Mitchell should reasonably have known that his conduct violated the Constitution, he was entitled to immunity from damages liability under the standard announced in *Harlow*.

The question presented in this case is whether a government official automatically loses his immunity defense if his conduct was governed by a settled legal standard at the time that the alleged unconstitutional action occurred. The court below concluded that petitioner could be held liable in damages because settled legal principles established that a warrantless entry into an individual's home violated the Fourth Amendment unless the entry was justified by probable cause and exigent circumstances. We submit that the proper inquiry under *Harlow* is not whether the general legal standard defining the plaintiff's constitutional right was clearly established, but whether the defendant should have known that the particular conduct challenged by the plaintiff violated the Constitution. Although the existence of a settled legal standard is relevant to this inquiry, it frequently will not be dispositive. The court of appeals therefore erred in depriving petitioner of his immunity defense solely because the general legal principles governing petitioner's conduct were clearly established at the time of the warrantless entry into respondents' home.

A. A Government Official Is Entitled To Immunity From Damages Liability Unless He Reasonably Should Have Known At The Time Of The Relevant Events That His Particular Conduct Violated The Constitution

1. A review of this Court's decisions interpreting the qualified immunity standard announced in *Harlow* makes clear that the Court never has viewed the existence of a settled legal principle—standing alone—as dispositive of a government official's immunity defense. The Court instead has looked to both the law and the facts, and asked whether the official reasonably should have known that his conduct was unlawful under the particular circumstances.

Harlow itself provides that a government official is not entitled to immunity from damages liability if the official's conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known" (457 U.S. at 818). The standard thus turns upon whether, at the time of the events in question, the government official should have known that the challenged conduct violated the plaintiff's "constitutional rights"; it does not depend upon whether the official should have known that his conduct was governed by a particular legal standard. See *id.* at 815 (citation omitted; emphasis in original) (objective component of qualified immunity test is whether "an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]' ").[8]

---

[8] The *Harlow* Court at one point did characterize the issue as whether the defendant "neither knew nor should have known of the relevant legal standard" (457 U.S. at 819), but the context of that statement indicates that the Court was referring to a situation in which the legal standard sufficed to

Of course, in some circumstances, a settled legal standard might be sufficient by itself to inform an official that his conduct violated the plaintiff's constitutional rights. For example, if this Court had concluded in *Mitchell* that by 1970 the law was clear that warrantless domestic wiretaps for national security purposes violated the Fourth Amendment, former Attorney General Mitchell would not have been entitled to immunity. The legal principle would have established a bright-line rule sufficient to inform government officials that the authorization of such wiretaps violated the Constitution.

In many circumstances, however, the general legal standard governing an official's conduct does not prescribe such a bright-line rule, and therefore would not put a reasonable official on notice that his conduct violated the plaintiff's constitutional rights. Where the application of a general legal principle turns upon the specific facts of each particular case, for example, the line between constitutional conduct and unconstitutional conduct can only be determined by reference to particular cases in which that principle has been applied. Thus, the principle that "probable cause" is necessary to justify a search under the Fourth Amendment undoubtedly is well settled, but that principle by itself plainly would not enable a reasonable law enforcement officer to ascertain

---

inform a government official that his particular conduct was unlawful. Thus, following that statement the Court observed that "[w]here an official could be expected to know that *certain conduct* would violate statutory or constitutional rights, he should be made to hesitate." *Ibid.* (emphasis added); see also *id.* at 818. As we discuss below, the Court's subsequent decisions confirm that immunity under the *Harlow* standard does not turn solely upon the existence of a settled legal standard.

whether a particular search is permissible; the legal standard depends for its application upon a myriad of case-specific factors. See pages 26-27, *infra*.

Since a general legal principle of this type, even if it was settled, would not inform a reasonable official whether his particular conduct violated the plaintiff's constitutional rights, the validity of the official's immunity defense instead turns upon whether an official charged with knowledge of the relevant case law should have known that the particular conduct challenged by the plaintiff violated the relevant general legal principle. The official would not be entitled to immunity simply because the general legal principle "ha[d] never explicitly been * * * appl[ied] * * * in identical circumstances. But in cases where there is a legitimate question whether [the official's conduct was prohibited], it cannot be said that [the official] violate[d] clearly established law" (*Mitchell* v. *Forsyth*, slip op. 23 n.12).

The Court followed this approach in assessing the immunity claim in *Davis* v. *Scherer*, 468 U.S. 183 (1984). The question in *Davis* was whether the defendant state officials' failure to provide a state employee with either a formal hearing prior to his discharge or a prompt post-termination hearing violated the employee's clearly established constitutional rights; the Court concluded that the officials were entitled to immunity under *Harlow*.[9] The Court observed that, at the time of the events at issue in *Davis*, its decisions established both that " 'some kind of a hearing' " was required in connection with the discharge of a government employee and that the

---

[9] Prior to his discharge, the employee had been provided with several informal opportunities to present his side of the story (468 U.S. at 185-186).

specific requisites of due process depended upon "a careful balancing of the competing interests—of the employee and the state—implicated in the official decision" (468 U.S. at 192 n.10 (citation omitted)). The Court noted, however, that it had not applied these general rules to "specify * * * minimally acceptable procedures for termination of employment" (*ibid.*). For that reason, it was "[not] * * * unreasonable * * * for the [state officials] to conclude that [the employee] had been provided with the fundamentals of due process" (*id.* at 192).

Davis makes clear that the existence of a general legal standard does not automatically defeat an official's immunity defense. The general legal standard imposed by the Due Process Clause was clear at the time of the challenged conduct—some type of hearing was required in connection with the discharge of a government employee, with the specific procedures mandated by the Constitution dependent upon a balancing of the relevant interests. The Court nonetheless concluded that the defendants' immunity defense should be sustained because, in the absence of case law applying these general due process principles in the employee discharge context, state officials had no clear basis for knowing that their actions were unlawful. See also *Davis*, 468 U.S. at 198 (Brennan, J., concurring in part and dissenting in part) (in order to determine whether a government official has violated a plaintiff's clearly established rights it is necessary to determine "whether governing case or statutory law would have given a reasonable official cause to know, at the time of the relevant events, that [the official's] acts or omissions violated the plaintiff's rights").

In its decision last Term in *Malley* v. *Briggs*, *supra*, the Court applied the same rule in a context

very similar to the present case.[10] The plaintiffs in *Malley* claimed that the defendant, a Rhode Island state trooper, violated their Fourth Amendment rights by seeking a warrant for their arrest on the basis of an affidavit that did not establish probable cause. The Court rejected the defendant's claims that he was entitled to absolute immunity for conduct connected with obtaining the warrant, but reaffirmed that a law enforcement officer is entitled to immunity under *Harlow* "if [he] acted in an objectively reasonable manner" (*Malley*, slip op. 5).

In contrast to the court of appeals' decision in the present case, this Court in *Malley* made clear that an officer's immunity turns not upon whether his conduct was governed by a settled legal principle, but rather upon whether he should have known that his particular conduct violated the Constitution. It stated that a police officer is immune from damages liability unless "a reasonably well-trained officer in [the defendant's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for [a] warrant" (slip op. 9).[11]

---

[10] *Malley* was an action against state officials, but the Court recognized in its decision in that case that "it is ' "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials" ' " (slip op. 4 n.2 (citations omitted)).

[11] In remanding the case for further proceedings, the Court in *Malley* expressly held that "whether [the officer's] conduct *in this case* was in fact objectively reasonable * * * must be resolved on remand" (slip op. 9 n.8 (emphasis added)). The Court also stated that an officer seeking a warrant "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant

The Court in *Malley* also observed that "the same standard of objective reasonableness that [the Court] applied in the context of a suppression hearing in [*United States* v. *Leon*, 468 U.S. 897 (1984)] defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest" (*Malley*, slip op. 8 (footnote omitted)). The Court held in *Leon* that the Fourth Amendment exclusionary rule should not be applied to suppress probative evidence if the law enforcement officer's actions in obtaining the evidence were objectively reasonable in view of the facts of the particular case. 468 U.S. at 923 (describing general legal standard); see also *id.* at 926 (holding that police officer's conduct was objectively reasonable in that case). The Court thus made clear that analysis based upon the particular facts of each individual case is required in order to determine whether qualified immunity is to be denied because the official should have known that his conduct violated the Constitution.[12]

---

should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized" (*id.* at 5).

[12] Respondents appear to argue (Br. in Opp. 9-11) that the rule discussed in *Malley* is limited to situations in which an officer acts in reliance upon a warrant. However, nothing in *Malley* indicates that this is so and both this Court and the courts of appeals have applied the identical principle in connection with alleged violations of constitutional rights removed from the warrant setting. Indeed, the Court observed in *Mitchell* that the same rule applies to warrantless searches. It stated that although "an official is [not] always immune from liability or suit * * * merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances," an official's immunity should be upheld where "there is a legitimate question whether

The courts of appeals generally have recognized that the qualified immunity standard turns upon whether the particular plaintiff's constitutional rights were clear under existing law, not upon whether the relevant legal standard was settled. Thus, following this Court's decision in *Bivens* v. *Six Unknown Named Agents*, *supra*, the Second Circuit held on remand that a police officer could avoid liability in damages without "prov[ing] probable cause in the constitutional sense." *Bivens* v. *Six Unknown Named Agents*, 456 F.2d 1339, 1348 (2d Cir. 1972). The officer only was required to show "that he believed, in good faith, that his conduct was lawful, [and] that his belief was reasonable" (*ibid.*; see also *id.* at 1348-1349 (Lumbard, J., concurring)). Other courts have reached the same conclusion. See *Floyd* v. *Farrell*, 765 F.2d 1, 5 (1st Cir. 1985) (holding that a police officer is entitled to immunity for a warrantless arrest "so long as the presence of probable cause is at least arguable"; the appropriate inquiry is

---

an exception to the warrant requirement exists, [because] it cannot be said that a warrantless search [in those circumstances] violates clearly established law" (slip op. 23 n.12).

Moreover, contrary to respondents' suggestion (Br. in Opp. 10), a decision in favor of petitioner in this case would not automatically expand the good faith exception to the exclusionary rule. The qualified immunity standard announced in *Harlow* and the good faith exception to the exclusionary rule recognized in *Leon* rest upon similar principles concerning the deterrence of unconstitutional conduct. Compare 457 U.S. at 819 with 468 U.S. at 918-920. But the Court in *Leon* based its decision upon the "evaluation of the costs and benefits" of the application of the exclusionary rule (468 U.S. at 913). An assessment of all the factors considered in *Leon*—some of which are not implicated in the immunity context—would be appropriate in order to determine the scope of the good faith exception.

"whether another officer, standing in [the defendant's] shoes and having the same information [the defendant] had, would reasonably have come to the conclusion that he had probable cause to arrest [the suspect]"); *Hobson* v. *Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984), cert. denied, No. 84-1139 (Mar. 25, 1985) (recognizing that an interpretation of *Harlow* requiring only that broad legal principles be clearly established "would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know *their* conduct is problematic") (emphasis in original).[13]

---

[13] See also, *e.g.*, *LeSavage* v. *White*, 755 F.2d 814, 821 (11th Cir. 1985) ("The question of qualified immunity under *Harlow* is one of reasonableness—would a reasonable person in [the defendant's] shoes have known he was violating [the plaintiff's] constitutional rights?"); *Zook* v. *Brown*, 748 F.2d 1161, 1165 (7th Cir. 1984) (defendants entitled to qualified immunity in connection with disciplining of a public officer for endorsing a local ambulance service since the application of the First Amendment to the particular facts of the case was not clear); *Evers* v. *County of Custer*, 745 F.2d 1197, 1203 (9th Cir. 1984) (individual defendants entitled to qualified immunity for declaring that certain property claimed by a private party was a public road, because it was not clear that due process required notice and a hearing prior to the issuance of the declaration); *Bilbrey* v. *Brown*, 738 F.2d 1462, 1466-1467 (9th Cir. 1984) (school officials' qualified immunity not defeated by fact that settled legal principle governed their conduct); *Bailey* v. *Turner*, 736 F.2d 963, 969-972 (4th Cir. 1984) (prison guard entitled to a jury instruction on qualified immunity in connection with his use of mace on a prisoner because no per se rule forbade use of mace).

Some courts of appeals have agreed with the court below that the existence of a settled legal standard is sufficient to deprive a government official of his immunity defense. See *Bass* v. *Wallenstein*, 769 F.2d 1173, 1186 (7th Cir. 1985) (holding that the defendants were not entitled to immunity be-

2. The Court has observed that "one policy consideration seems to pervade the analysis [relating to official immunity]: the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974). Thus, "[i]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." *Id.* at 242; see also *Butz* v. *Economou*, 438 U.S. 478, 506-507 (1978); *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 319, 321 (1975). The Court accordingly has concluded that executive officials are entitled to immunity in situations in which the threat of liability might cause such officials to "exercise their discretion with undue timidity" (*Wood* v. *Strickland*, 420 U.S. at 321). Indeed, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law" (*Malley*, slip op. 5).

A government official may be held liable in damages when he reasonably "could be expected to know that certain conduct would violate statutory or con-

---

cause the Eighth Amendment standard of "deliberate indifference to inmates' serious medical needs" was clearly established at the pertinent time); *Fujiwara* v. *Clark*, 703 F.2d 357, 361 (9th Cir. 1983) (denying qualified immunity because "[t]he law governing the conduct of [the defendants] was then clearly established"); *Trejo* v. *Perez*, 693 F.2d 482, 488 n.10 (5th Cir. 1982) ("[t]he Fourth Amendment rule on warrantless arrests *is* 'clearly established law.' If an arrest lacks probable cause for its support, it is, objectively speaking, in violation of clearly established law") (emphasis in original).

stitutional rights" because an official who acts unlawfully in that situation "should be made to hesitate" (*Harlow*, 457 U.S. at 819 (footnote omitted)). Since the official should have known that his actions were unlawful, and therefore could have conformed his conduct to the mandate of the Constitution, he may be required to answer in damages for any injury flowing from his unlawful actions.

If, on the other hand, "an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences' " (*Harlow*, 457 U.S. at 819, quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967)). In this circumstance, the official "could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful" (*Harlow*, 457 U.S. at 818). The official could avoid committing a constitutional violation only by failing to take any action at all or by exercising his authority in an overly cautious manner, and the threat of monetary liability most likely would encourage such timid conduct. As the Court has recognized, "[t]he imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious [government official] from exercising his judgment independently, forcefully, and in a manner best serving the [public] interest" (*Wood* v. *Strickland*, 420 U.S. at 319-320).

A rule that deprived a government official of immunity whenever the legal principle governing the official's conduct was clearly established—even if that principle did not by itself contain guidance sufficient

to enable the official to conform his conduct to constitutional requirements—plainly would not provide the protection from unforeseen monetary liability needed to ensure that officials are not deterred from properly exercising their authority. An official could be subjected to monetary liability even if the relevant legal principle, and the case law applying that principle, did not provide any indication that the official's conduct was unlawful. Such an immunity rule therefore would "contribute not to principled and fearless decision-making but to intimidation" (*Pierson* v. *Ray*, 386 U.S. at 554)—the very result that qualified immunity always has been designed to prevent. See *Harlow*, 457 U.S. at 818-819; *Procunier* v. *Navarette*, 434 U.S. at 562; *Wood* v. *Strickland*, 420 U.S. at 319-320.

B. The Rule Adopted By The Court Of Appeals Would Subject Law Enforcement Officers To Damages Liability In The Situations Where Immunity Is Most Appropriate

The rule adopted by the court of appeals nullifies the immunity defense in the situations that will most frequently arise and in which the defense is most necessary—when the propriety of a law enforcement officer's action is governed by a settled legal principle, but the application of that principle is not clear in the particular factual context confronting the officer. Many of the decisions that a police officer must make on a daily basis, such as whether he may stop and question a suspect, whether he has probable cause to effect an arrest, whether he may conduct a search, whether the action that he contemplates amounts to a search or a seizure, and whether exigent circumstances justify immediate warrantless action, turn upon the application of settled, extremely general,

Fourth Amendment principles to the particular facts of each individual situation.[14] As the Court has observed in the context of investigative detention, "[m]uch as a 'bright line' rule would be desirable, * * * common sense and ordinary human experience must govern over rigid criteria." *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985), slip op. 10.

For example, the general definition of the probable cause needed to justify an arrest is "whether at that moment the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); see also *Draper* v. *United States*, 358 U.S. 307, 313 (1959). Thus, "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983); see also 1 W. LaFave, *Search and Seizure* § 3.2, at 449 (1978) (citation and footnote omitted) ("[n]otwithstanding the frequency with which police, lawyers and judges must decide whether a given set of facts amounts to probable cause, it

---

[14] An investigative stop must be justified by reasonable suspicion (*Terry* v. *Ohio*, 392 U.S. 1, 20-27 (1968)), and its duration is subject to a reasonableness standard (*United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985)); a search occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed" and a seizure is "some meaningful interference with an individual's possessory interests in that property" (*United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984) (footnotes omitted)). The standards relating to probable cause and warrantless action are discussed in the text below.

remains 'an exceedingly difficult concept to objectify' ").

The "exigent circumstances" that will justify a warrantless entry into an individual's home in order to arrest a suspect similarly cannot neatly be described in a detailed legal standard. In order to determine whether exigent circumstances permitted an officer's actions in a particular situation it is necessary to assess the facts as they reasonably appeared to the officer at the time he effected the arrest. *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); *Warden* v. *Hayden*, 387 U.S. 294, 298-300 (1967); see generally *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984). Thus, the Court concluded in both *Santana* and *Hayden* that the officer's immediate entry was justified under the circumstances of each case, but did not establish a set of detailed rules for ascertaining the presence of exigent circumstances. 427 U.S. at 42-43; 387 U.S. at 298-299. The lower courts also have concluded that a bright-line standard cannot be used in making this determination; indeed, they have developed somewhat differing approaches for determining whether an officer's warrantless entry complied with the Fourth Amendment.[15]

---

[15] Several courts, including the Eighth Circuit, have followed the approach first set forth in *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc), "a leading federal case defining exigent circumstances" (*Welsh*, 466 U.S. at 751), which identified six factors to be considered in making this determination. See, *e.g.*, *United States* v. *Baldacchino*, 762 F.2d 170, 176-177 (1st Cir. 1985); *United States* v. *Martinez-Gonzalez*, 686 F.2d 93, 100-102 (2d Cir. 1982); *United States* v. *Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978); *United States* v. *Shye*, 492 F.2d 886, 891-892 (6th Cir. 1974); *Vance* v. *North Carolina*, 432 F.2d 984, 990-991 (4th Cir. 1970). Other courts have cautioned against adopting a " 'checklist-

Law enforcement officers "often operate 'in the midst and haste of a criminal investigation' " (*Malley* v. *Briggs*, slip op. 5 (Powell, J., concurring in part and dissenting in part) (citation omitted)), and frequently are called upon to make instantaneous decisions in "rapidly unfolding and often dangerous situations on city streets." *Terry* v. *Ohio*, 392 U.S. 1, 10 (1968)). In view of the general nature of the governing legal principles, it is inevitable that police officers operating under short deadlines in the pressurized atmosphere of an ongoing investigation will take actions that subsequently will be found to violate the Fourth Amendment. See *Stone* v. *Powell*, 428 U.S. 465, 539 (1976) (White, J., dissenting) ("experience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question"); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. at 418 (Bur-

---

type [of] analysis,' " but have recognized that a bright-line rule is not possible. *Llaguno* v. *Mingey*, 763 F.2d 1560, 1564 (7th Cir. 1985) (en banc) (citation omitted); see also *ibid.* ("The operative word in the Fourth Amendment is 'unreasonable'; so the question ought to be, were the police unreasonable in not getting a warrant in the circumstances that confronted them?"); compare LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. Mich. J.L. Ref. 417, 454-458 (1984) (proposing a standard that varies based upon whether the arrest was "planned"). In still other situations, the courts have looked to the facts of the case at hand to determine whether a warrantless entry was "imperative." *United States* v. *Manfredi*, 722 F.2d 519, 522 (9th Cir. 1983); *United States* v. *Hultgren*, 713 F.2d 79 (5th Cir. 1983); *United States* v. *Titus*, 445 F.2d 577, 578-579 (2d Cir.), cert. denied, 404 U.S. 957 (1971).

ger, C.J., dissenting) ("[i]nadvertent errors of judgment" and "honest mistakes" will "inevitably occur given the pressures inherent in police work having to do with serious crimes"). Indeed, the application of these legal standards often involves "grey, twilight area[s], where the law is difficult for the courts to apply, let alone for the policeman on the beat to understand." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 269 (1973) (Powell, J., concurring).

The rule adopted by the court below would divest law enforcement officers of their immunity from damages liability in almost every lawsuit in which a plaintiff sought damages for a violation of the Fourth Amendment. An officer would be held to a standard of perfection; if he incorrectly predicted the manner in which the court later resolved some complex Fourth Amendment question, he would be subject to monetary liability on the ground that the general legal principle governing that question was clearly established. That result would put the officer in the "unhappy" dilemma of "choos[ing] between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does" (*Pierson*, 386 U.S. at 555). Rather than interpreting *Harlow* to eliminate virtually all immunity from damages liability for the Nation's law enforcement officers, this Court should reaffirm that an officer is entitled to the same "ample room for mistaken judgments" available to other government officials (*Malley*, slip op. 7). An officer therefore should be immune from damages liability unless he should have known at the time that he acted that his particular conduct violated the plaintiff's constitutional rights.

C. This Case Should Be Remanded To Allow The Courts Below To Apply The Correct Immunity Standard

The court of appeals' rejection of petitioner's immunity defense rested upon that court's determination that the existence of a clearly established legal standard is sufficient to subject a government official to damages liability (see Pet. App. 16a). However, as we have discussed, these general legal principles could not by themselves inform petitioner that his conduct violated the Constitution. The court of appeals simply failed to consider whether, in light of the facts known to petitioner and the case law defining probable cause and exigent circumstances, petitioner could reasonably have believed that his warrantless entry into respondents' home was legally justified. This Court accordingly should remand the case for reconsideration of petitioner's immunity defense under the correct legal standard. See *Malley*, slip op. 9 n.8; *Harlow* v. *Fitzgerald*, 457 U.S. at 819-820.[16]

Respondents may argue that a remand is unnecessary because the facts in the record are sufficient to

---

[16] Respondents imply (Br. in Opp. 4-6) that petitioner is not entitled to qualified immunity because he did not consciously rely upon the exigent circumstances exception to the warrant requirement at the time that he entered respondents' home. This Court concluded in *Harlow*, however, that a government official's subjective intent is irrelevant in determining whether the official is entitled to immunity from damages liability. See 457 U.S. at 816-819; see also *United States* v. *Leon*, 468 U.S. at 922-923 n.23. Indeed, the validity of an officer's conduct under the Fourth Amendment turns solely upon the facts known to the officer. The officer's own view regarding the constitutionality of his conduct is irrelevant. 1 W. LaFave, *supra*, § 3.2(b), at 459-461. The same rule applies in assessing the officer's entitlement to immunity.

defeat petitioner's immunity defense. This Court should reject any such suggestion for two reasons. First, the merits of petitioner's immunity defense have not been fully considered by either of the courts below, and we submit that it would be premature for this Court to decide that issue now. Second, the relevant facts demonstrate that petitioner most likely *is* entitled to immunity from damages liability for his conduct on November 11, 1983.

The district court found it unnecessary to address petitioner's immunity claim because it ruled in favor of petitioner on the merits, holding that petitioner's conduct did not violate the Fourth Amendment (Pet. App. 25a & n.5). That determination obviously is entitled to substantial weight in assessing petitioner's immunity defense. Indeed, in view of the district court's conclusion that petitioner's conduct did not violate the Fourth Amendment, petitioner almost certainly could reasonably have believed that he had conformed to the relevant Fourth Amendment requirements. Cf. *Malley*, slip op. 5-6 (Powell, J., concurring in part and dissenting in part) (magistrate's finding of probable cause is entitled to special weight in assessing reasonableness of officer's conduct).

The district court first found that petitioner had probable cause to believe that Vadaain Dixon was responsible for the bank robbery. Dixon had a history of armed robbery and recently had pleaded guilty to several bank robberies, he fit the bank tellers' description of the robber, and two tellers had positively identified him from a photo display. Pet. App. 23a. This aspect of the district court's decision was not questioned by the court of appeals.

Second, the district court concluded that petitioner had probable cause to believe that Vadaain Dixon was

at respondents' home. Petitioner had been told by Vadaain Dixon's probation officer that Dixon and his wife Cheryl both had admitted that she was living at respondents' home. Furthermore, the description of the getaway car, even if not precisely identical to respondents' car, was a legitimate factor for petitioner to consider. Pet. App. 23a.

Finally, relying on the factors previously applied by the Eighth Circuit in *United States* v. *Kulcsar*, 586 F.2d 1283, 1287 (1978), the district court ruled that exigent circumstances justified petitioner's warrantless entry into respondents' home. The court cited—among other factors—the seriousness of the offense, the known dangerousness of Vadaain Dixon, and the likelihood that Dixon would escape if he was not quickly apprehended. Pet. App. 24a.

In view of the district court's detailed findings, it cannot be said that petitioner's immunity defense is insufficient as a matter of law. Even the court of appeals did not conclude that the facts relied upon by petitioner were insufficient to establish probable cause and exigent circumstances; it instead rested its decision principally on the conclusion that the relevant facts were in dispute (Pet. App. 8a-9a, 10a, 12a, 15a).[17] The court of appeals' conclusion that the

---

[17] The court of appeals' finding that relevant facts were in dispute rested primarily upon the court's consideration of facts not known to petitioner. For example, the court cited newspaper reports and an alleged conversation between a police officer and one of respondents' neighbors in finding a factual dispute regarding the description of the getaway car (Pet. App. 9a-10a), and it relied upon facts in respondents' affidavits to find a dispute regarding Cheryl Dixon's residence (*id.* at 11a). It is well settled, however, that the existence of probable cause turns solely on the facts reasonably believed by an officer at the time of the arrest, even if those facts may turn out in part to be incorrect. See, *e.g.*, *Illinois* v. *Gates*, 462

substantive legality of petitioner's conduct was sufficiently unclear to warrant submission of the issue to a jury makes it quite unlikely that an officer in petitioner's position should have known that he was violating the Fourth Amendemnt.

Respondents assert (Br. in Opp. 15) that the factual disputes cited by the court of appeals require the affirmance of the judgment below. But the court of appeals did not simply conclude that the district court erred in granting summary judgment; it held that petitioner was not entitled to immunity from monetary liability (Pet. App. 16a-17a). If facts relevant to the merits of the immunity issue were in dispute, the court of appeals should have vacated the district court's judgment and remanded the action for further proceedings. The supposed existence of a factual dispute therefore cannot justify the court of appeals' elimination of petitioner's immunity defense.[18]

U.S. at 231-235, 245 n.14; *Michigan* v. *DeFillippo*, 443 U.S. 31, 36 (1979); *Franks* v. *Delaware*, 438 U.S. 154, 165 (1978); *Hill* v. *California*, 401 U.S. 797, 803-804 (1971); 1 W. LaFave, *supra*, § 3.2, at 466. Therefore, as the district court correctly observed (Pet. App. 25a n.5), these facts are not relevant to the merits of the Fourth Amendment issue.

Respondents may believe that the facts cited by the court of appeals are relevant because they cast doubt on the credibility of petitioner's recitation of the facts that he knew at the time of the events in question. Assuming that such an interpretation of this information is conceivable, it might be found to provide grounds for respondents to obtain discovery relating to the scope of petitioner's knowledge (see note 18, *infra*). The extraneous facts themselves could be relevant in evaluating the constitutionality of petitioner's conduct only to the extent they are found to be probative of petitioner's knowledge.

[18] Respondents also claim (Br. in Opp. 12-14) that they were entitled to discovery prior to the resolution of the immunity

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

BARBARA L. HERWIG
RICHARD A. OLDERMAN
Attorneys

AUGUST 1986

---

issue. The general rule, of course, is that "discovery should not be allowed" prior to a determination regarding the defendant's immunity (*Harlow*, 457 U.S. at 818). That rule plainly is appropriate when immunity turns solely on a legal question, such as whether a particular legal rule was clearly established at the time of the conduct in question. Where, as here, the defendant's immunity depends upon case-specific facts such as the information known to the defendant, a limited amount of discovery may be appropriate. Any such discovery must, of course, be tightly restricted to prevent the erosion of the protections of immunity. See *Harlow*, 457 U.S. at 819-820 n.35 (maintenance of "[i]nsubstantial lawsuits undermine[s] the effectiveness of government as contemplated by our constitutional structure"); see also *id.* at 814, 816. Respondents will be free to argue on remand that they are entitled to discovery in the present case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20303

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

(5)

No. 85-1520

In the

Supreme Court of the United States

October Term, 1986

RUSSELL ANDERSON,

Petitioner,

vs.

ROBERT E. CREIGHTON, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF

MESHBESHER, SINGER & SPENCE, LTD.
Ronald I. Meshbesher,
Counsel of Record,
John P. Sheehy,
1616 Park Avenue
Minneapolis, Minnesota 55404
(612) 339-9121

Counsel for Respondents

BEST AVAILABLE COPY

6618

QUESTIONS PRESENTED

The Respondents believe the questions presented by this case can be more accurately and thoroughly stated as follows:

Is the Qualified, or So-Called Good Faith Immunity Defense, Available to a Law Enforcement Officer Who Conducts a Warrantless, Presumptively Unreasonable, Search in Violation of the Fourth Amendment?

Is Summary Judgment Appropriate Before Permitting Discovery When a Rank-and-File Law Enforcement Officer Claims He Is Entitled to Qualified Immunity and the Facts Necessary to Establish the Immunity Are Based on His Own Ex Parte Affidavits?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities. iii

Constitutional Provisions vi

Statement of the Case 1

Summary of Argument. 13

Argument

THE COURT OF APPEALS DID NOT ERR BY REVERSING THE SUMMARY JUDGMENT IN FAVOR OF PETITIONER

A. The Court of Appeals Correctly Denied the Petitioner Qualified Immunity Because the Legal Standards Governing His Conduct And The Creightons' Rights Were Both Clearly Established. 15

B. An Executive Agent Should Not Be Entitled To Qualified Immunity For Conducting A Warrantless, Presumptively Unreasonable Search Because Immunity In This Context Would Change The Substantive Fourth Amendment Law. 35

C. The Petitioner Violated The Bright-Line Rule of Steagald v. United States, By Searching The Homes of Third Parties Without A Search Warrant. 48

D. The Court of Appeals Correctly Reversed The Trial Court's Summary Judgment In Favor Of The Petitioner Because Discovery Was Not Allowed and Factual Disputes, Conflicts

Over Inferences To Be Drawn From Circumstantial Evidence, And Credibility Issues Precluded Summary Judgment . . . 51

Conclusion 58

TABLE OF AUTHORITIES

Cases — Page

Adickes v. Kress & Co., 398 U.S. 654 (1962) 48

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) . . . 11, 39

Brinegar v. United States, 338 U.S. 160 (1948) 29,41,44

Chimel v. California, 395 U.S. 752 (1969) 18, 37

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 18,37

Davis v. Scherer, 468 U.S. 183 (1984). 24

Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) 18,49

Entick v. Carrington, 19 How. St. Tr. 1030, 92 Eng. Rep. 807 (K.B. 1765). 46

Harlow v. Fitzgerald, 457 U.S. 800 (1982) . . . . . passim

Johnson v. United States, 333 U.S. 10 (1947) 43

Katz v. United States, 389 U.S. 347 (1967) 22

Malley v. Briggs, 475 U.S. ___, 89 L.Ed.2d 271 (1986) 25,29,37,39

Marbury v. Madison, 5 U.S. (Cranch) 137 (1803) 27,32

McDonald v. United States, 335 U.S. 451 (1948) 18

Mitchell v. Forsyth, 472 U.S. ___, 86 L.Ed.2d 411 (1985). 21,22,23, 24

Payton v. New York, 445 U.S. 573 (1980) 37,38

Semayne's Case, 5 Co.Rep. 91a, 91b 77 Eng. Rep. 194 (K.B. 1765) 37

Silverman v. United States, 365 U.S. 505 (1961) 38

Steagald v. United States, 451 U.S. 204 (1981) 14,17,48, 49,57

United States v. Leon, 468 U.S. 897 (1984) 29,40

United States v. United States District Court, 407 U.S. 297 (1972) 23,36,39

United States v. Ventresca, 380 U.S. 102 (1965). 26,36,42

Welsh v. Wisconsin, 466 U.S. 740 (1984) 35,37,39 42

Whitely v. Warden, 401 U.S. 560 (1971) 54

CONSTITUTIONAL PROVISIONS

U.S.CONST.amend IV . . . . . passim

STATUTES

28 C.F.R. 50.15. 33,34

Fed. Reg. Vol. 51, No. 145 . . . . . 33, 34

Sup.Ct.R. 21(f) & 34(f). 47

OTHER AUTHORITIES

III Blackstone's Commentaries on the Laws of England (1768) 27, 31

I Campell, Lives of the Chief Justices of England (1873). 36

A. Dicey, Law of the Constitution (9th ed. 1956) 31

II. M. Hale, Historia Placetorium Coronae (1736) 46

5 Harper, James, Gray, The Law of Torts (2nd. ed. 1986) 34

10 W. Holdsworth, A History of English Law (1938) 28, 31

J. Landyski, Search and Seizure and the Supreme Court (1966). 38

N. Lasson, The History and Development of the Fourth Amendment of the United States Constitution (1937) 38

R. Pound, The Spirit of Common Law (1921) 30

T. Taylor, Two Studies in Constitutional Interpretation (1969) 38

No. 85-1520

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF

CONSTITUTIONAL PROVISION

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly

describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

The Respondents, Sarisse and Robert Creighton are husband and wife who reside with their children in a home they own in St. Paul. Sarisse Creighton is the sister of Vadaaïn Dixon, who was the object of the warrantless search conducted by police and the FBI at the Creighton home on November 11, 1983. The Petitioner, Russell Anderson, is an F.B.I. agent who led the search. The Creightons were never suspected of being involved in any of Vadaain Dixon's criminal activities. Although the Petitioner's brief sets out rather thoroughly the criminal history of Vadaain Dixon, there is notably little detail in describing the search of the Creightons' home, which led to this litigation.

The Search of the Creightons' Home

On November 11, 1983, Sarisse Creighton picked up her husband from work

at about 4:00 p.m. Together they left Robert's work place to finish their shopping, driving their maroon 1976 Oldsmobile.

Sometime between 7:30 and 8:00 p.m. they returned home. Sarisse Creighton went upstairs to go to sleep. Their three daughters were playing quietly; Robert Creighton was watching television. (J.A. 47, 43).

Suddenly, a spotlight flashed through the windows of their home. Robert Creighton went to the front door, turned on the porch-light, and opened the door. He saw a uniformed police officer on his step with a shotgun, and other uniformed officers and plainclothes men walking up to his home. Some of the other men brandished shotguns. (J.A. 43-44).

According to Officer Snyder, Robert Creighton asked what they wanted. (See

report of Officer W. Snyder).[1] A uniformed officer, Sergeant DeNoma told him to "keep his hands in sight." The officers then went into the Creighton home. Robert Creighton immediately objected to the officers entering his home without a search warrant. (See Report of W. Snyder).

Robert Creighton insists that neither the uniformed officers nor the plainclothes men offered any explanation for their presence. In response to his demand for a search warrant, Sergeant DeNoma replied, "We don't have a search warrant. I don't need a search warrant; you watch too much TV." (J.A. 44).

The three young Creighton girls began to cry and scream when the officers entered the house. Robert Creighton asked

---

[1]This report is not reprinted in the Joint Appendix but is part of the appellate record.

the officers to put away the guns because of the children. They refused. (J.A. 44).

Sarisse Creighton awoke to the shrieking of her children and the shouting of her husband, and ran downstairs. On the stairway, she encountered a man pointing a shotgun at her. She became terribly upset and asked what was happening, but no one responded. (J.A. 47).

Sarisse then saw her husband attempting to make a phone call to his father. She ran upstairs and picked up a telephone extension, telling Robert to hang up, afraid that the officer downstairs would harm him. She then told Mr. Robert Creighton, Sr., her husband's father, that the police were searching their home and that she did not know why. She asked Mr. Creighton, Sr. to come over immediately. (J.A. 145).

Sarisse ran back downstairs, where she saw and heard the officers yelling at

her three daughters to "sit their damn asses down and stop screaming." An officer said to her, "Why don't you make your damn kids sit on the couch and make them shut up?" (J.A. 48). At the same time, the officers were shouting and arguing with her husband saying they did not need a search warrant. Her husband asked them to leave. (J.A. 46).

At that point, Sarisse went upstairs with two officers. They stood in the doorway of each of the three bedrooms, but did not enter them, or look in the closets or under the bed. They did not search the third floor of the house. (J.A. 46).

When she returned downstairs, she saw her husband go down to the basement. Two uniformed officers preceded him and a plainclothes man followed. Petitioner remained upstairs with her. She then heard the officers beating her husband. (J.A. 46).

Robert Creighton had been on his way to the garage to show the officers his car. When he reached the bottom step, Sergeant DeNoma was standing between him and the door to the garage. When Robert attempted to open the door, DeNoma struck him in the face. He fell back and struck his head on the wall, and his mouth and forehead began to bleed. (J.A. 44). Shaunda, the Creighton's 10-year-old daughter, witnessed the assault. She started screaming and crying, and later told her mother that an officer hit her. (J.A. 48).

Sarisse Creighton picked up the phone to call her mother, terrified that the police were going to kill her husband. As she attempted to place the call, an officer kept kicking and grabbing the phone, telling her to "hang up that damn phone." (J.A. 48-49).

At this point, Sarisse told her children to run out the front door and go

to her neighbor's house for safety. The children ran out and a plainclothes officer chased them. Sarisse was told by her neighbor, Roxanne Johnson, that this man picked up Shaunda and shook her. Later that night, Shaunda was taken to the hospital and treated for an injury to her arm. (J.A. 49).

The Petitioner States: "I Don't Need a Damn Search Warrant When I'm Looking for a Fugitive."

Family members and friends had begun to come into the house about this time. Sarisse Creighton herself asked Petitioner for a search warrant. He replied, "I don't need a damn search warrant when I'm looking for a fugitive." (J.A. 50).

Robert Creighton, Sr., arrived and saw his son handcuffed and bleeding. He asked Anderson for a search warrant. Again, Anderson replied that they did not need one. (J.A. 58).

The Earlier Searches

Anderson and the armed contingent of officers searched two homes before the Creightons'. At approximately 8:00 p.m., he and the other officers assembled in a parking lot a block from the home of Iris Dixon, the mother of Vadaain Dixon and Sarisse Creighton, then went to her home. (J. A. 19-20).

When Iris Dixon came to the door, Anderson was on the step with a number of officers armed with shotguns. She recognized Anderson because he had questioned her in a prior investigation concerning Vadaain. Iris Dixon heard Anderson say something about a warrant for Vadaain Dixon's arrest. Anderson and the other officers entered without her permission. Iris Dixon did not resist because she feared she and her son, Jamie, would be hurt, but, she did ask Anderson for a search warrant. Anderson again said he did not need one. (J.A. 54).

The officers who entered by the front door went to the back door and let in more armed officers. The officers searched all the rooms and closets in her house. Iris Dixon, terrified, began to cry. (J.A. 49).

During the search Anderson questioned Jamie Dixon about why his driver's license showed his residence as 908 Aurora. Jamie explained it was the home of his grandmother, Minnie Dixon. Iris Dixon pleaded with Anderson not to go to Minnie Dixon's home because Minnie, who was in her seventies, and Minnie's uncle, who was 86 years old, had recently been ill. When Anderson left, Iris Dixon called Minnie Dixon to warn her and told her to let the police in and to cooperate. (J.A. 55).

Anderson then went to Minnie Dixon's home. He states that she consented to their entry and search. (J.A. 21).

The Visit and Interrogation by the Marshalls and Probation Officer on Thursday, November 10, 1983

On Thursday, November 10, 1983, the day before these searches, two United States marshalls and a federal probation officer, William Johnson, visited Iris Dixon's home. (J.A. 56). They were investigating Vadaain Dixon's failure to return to a half-way house called the Volunteers of America. They questioned both Iris Dixon and Sarisse Creighton, who was at her mother's house, concerning the whereabouts of Vadaain Dixon. The women told these agents that they did not have any information about Vadaain Dixon. The officers told them their cars were "okay." Sarisse Creighton assumed this meant that the officers were satisfied that Vadaain didn't have the vehicles. The officers left and did not visit the Creighton home to look for Vadaain Dixon. (J.A. 51).

The Lawsuit

The Creightons sued Anderson pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), alleging he violated their Fourth Amendment rights by conducting the warrantless search. After requesting an extension of time to respond to the complaint, Anderson moved for summary judgment. He never filed an answer. The District Court did not allow the Creightons any discovery.

Anderson's and Johnson's Affidavits

Russell Anderson submitted an affidavit with the motion for summary judgment. William Johnson, the federal probation officer, also submitted an affidavit two days before the summary judgment hearing. Anderson's affidavit stated that on November 11, 1983, prior to 3:30 p.m., a bank in St. Paul, Minnesota had been robbed, within a short time he suspected that Vadaain Dixon had robbed the bank. (J.A. 17-19). To confirm his

suspicion, Anderson arranged for the bank tellers to view a photo spread. According to Anderson, the tellers identified Vadaain Dixon. (J.A. 19).

Anderson also states that one of the police officers had been told by a person in the neighborhood of the bank that the robber may have escaped in "a burgundy or maroon and silver car, possibly a Buick. Other witnesses said it was a darker color." (J.A. 17-18).

Anderson further states that he knew Cheryl Dixon, Vadaain's wife and his alleged accomplice in other robberies had lived with the Creightons until November 9, 1983. (J.A. 21). Johnson's affidavit states that he told Anderson this on November 10, 1983, the day before the warrantless searches. (J.A. 39). Johnson claims that Cheryl and Vadaain Dixon had told him this information in a pre-sentence investigation conducted on November 1, 1983. (J.A. 39). Although

Johnson and the marshalls had allegedly known this for at least two days and Anderson for a least one day before the search of the Creighton home, they did not look for Vadaain Dixon at the Creighton home until the full armed contingent arrived the night of November 11, 1983.

According to the Creightons, Cheryl Dixon did not live with them, and Vadaain Dixon never visited their house. (J.A. 45, 47).

One essential fact is undisputed. Anderson did not even attempt to secure a search warrant by any means, including the telephone warrant procedure.

SUMMARY OF ARGUMENT

The Court of Appeals correctly reversed the district court's summary judgment in favor of the Petitioner, which had been granted before discovery, because factual issues existed concerning probable cause and exigent circumstances. The

Petitioner maintains, however, the undisputed facts show he violated the Creightons' clearly established rights under United States v. Steagald. The Petitioner now admits that the district court should have allowed discovery, thus he, in effect, confesses error.

The Respondents also urge the Court not to adopt the Petitioner's broader case-specific qualified immunity standard because it is inconsistent with the holding and the aims of Harlow v. Fitzgerald, 457 U.S. 800 (1982). Further, new Justice Department's policy developments also make any further extension unnecessary. Finally, the Respondents maintain that the Petitioner's proposed standard would change the law of the Fourth Amendment making warrantless searches presumptively unreasonable to a new standard: when in doubt, search. The proposed standard would also extend the good faith exception to the exclusionary

rule to the exigent circumstances context. The twin applications would stunt constitutional growth and diminish the Rule of Law. Therefore, the Respondents maintain that the Court of Appeal decision be affirmed in all respects, but with leave to file their own summary judgment motion establishing the Petitioner's liability as a matter of law.

ARGUMENT

THE COURT OF APPEALS DID NOT ERR BY REVERSING THE SUMMARY JUDGMENT IN FAVOR OF PETITIONER.

A.
The Court of Appeals Correctly Denied the Petitioner Qualified Immunity Because the Legal Standards Governing His Conduct and the Creightons' Rights Were Both Clearly Established.

The Court of Appeals correctly held that the Petitioner was not entitled to summary judgment because the legal standards governing his actions and the Creightons' constitutional rights were both clearly established at the time he

searched their home. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court held that government officials would be shielded from civil damages if their unconstitutional conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

The Court further stated:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.

Harlow, 457 U.S. at 818.

The district court in this case did not answer the question whether the law was clearly established. (Pet.App. 25a n. 5). Instead, the court granted summary judgment, before allowing discovery, on the ground that the Petitioner's actions were legal because he had probable cause and because exigent

circumstances justified the search of the Creighton home.

The Court of Appeals reversed because of factual disputes in the record concerning the existence of probable cause and exigent circumstances. The Court of Appeals also denied the Petitioner qualified immunity because the Creightons' "fourth amendment rights and the exigent circumstances doctrine were 'clearly established.'" (Pet.App. 16a.) Therefore, the Court of Appeals remanded the case for trial, reserving the Petitioner's right to prove probable cause and exigent circumstances as a defense to a properly instructed jury.

There is ample support for the Court of Appeals' ruling. Steagald v. United States, 451 U.S. 204 (1981), conclusively established that an officer searching for a felon in a third party's home must have a search warrant unless exigent circumstances imperatively call for action

without prior judicial approval. See also Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (If exigent circumstances are claimed, "there must be a showing by those seeking exemption that the exigencies of the situation made that course imperative") (citing McDonald v. United States, 335 U.S. 451, 456 (1948)); Chimel v. California, 395 U.S. 752, 761 (1969) (absent "grave emergency" a warrant must be obtained from a magistrate).

The factors considered by the Court of Appeals in determining the legal standard for exigent circumstances were derived from Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).

The Petitioner now urges on the Court a broader qualified immunity standard than that defined in Harlow or its progeny. Significantly, the Petitioner does not challenge the Court of Appeals' rulings that (1) the general legal standard defining the Creightons'

constitutional rights was clearly established, (Pet. Brief 14), and (2) that the Petitioner "should have known his particular conduct was governed by a particular legal standard." (Pet. Brief, 15).

Rather than asserting that these standards were not clearly established, the Petitioner suggests that because the established standard did not state a "bright-line" rule sufficient to inform a reasonable official that his conduct violated the Constitution, he was erroneously deprived of qualified immunity. (Pet. Brief 11).

The Petitioner's proposed standard turns on the "specific facts" and circumstances of the case. (Pet. Brief 16). The Petitioner now concedes that this standard cannot be applied without

permitting discovery.[2] (Pet. Brief 33-34 n. 18).

The Petitioner's proposed standard conflicts with the clearly articulated goals of Harlow. The Harlow decision rejected the malice element of the Court's prior formulations of qualified immunity and instead formulated "objective" good-faith in an attempt to eliminate the need for discovery before a ruling on

---

[2]The Court should note that this in itself is a confession of error. The Petitioner served a summary judgment motion in lieu of an answer to the complaint. No discovery has ever been performed in this case. Indeed, the Petitioner maintained in his summary judgment motion that discovery should not be permitted, he opposed a motion for reconsideration made to the trial court requesting discovery, and he argued on appeal that discovery was properly denied.

qualified immunity. The Court plainly envisioned that, by eliminating the element of malice, a trial court could answer a purely legal question on summary judgment. In Mitchell v. Forsyth, 472 U.S. __, 86 L.Ed.2d. 411, 426 (1985), the Court wrote as to the trial court's duty:

> All that it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . .

86 L.Ed.2d at 426. See also id. n. 9 ("We emphasize . . . the appealable issue is purely a legal one: whether the facts alleged by the plaintiff, or, in some cases, by the defendant, support a claim of violation of clearly established law.")

The standard the Petitioner claims should be applied -- one that admittedly involves discovery -- is not the "immunity" envisioned by Harlow, which was aimed at resolving cases without discovery into the defendant's state of mind.

Rather, the Petitioner would bring the defendant's state of mind back into the inquiry by making relevant the defendant's knowledge of the "facts and circumstances" of each case. That is the type of inquiry Harlow expressly eliminated.

The interpretation the Court of Appeals applied is perfectly consistent with qualified immunity cases decided by this Court after Harlow. In Mitchell v. Forsyth, 472 U.S. ____ 86 (1985), the Court was presented with the question whether a wire tap to gather information on national security, ordered by the Attorney General without a warrant, violated clearly established law. This question, as the Court noted, had been specifically left open in Katz v. United States, 389 U.S. 347 (1967). The practice of using wire taps in national security matters without prior judicial approval had been well established since 1940, and district court decisions addressing the

issue supported the Attorney General's action before the wire tap in Forsyth. Moreover, a statute appeared to authorize the tap. After the Forsyth tap took place, the practice was declared unconstitutional in United States v. United States District Court, 407 U.S. 297 (1972). Consequently, in Forsyth the Court ruled that the Attorney General was entitled to immunity. The Court only answered the purely legal question, which it found to be "open" or not clearly established at the time he acted. 86 L.Ed.2d 431.

The Court's analysis in Forsyth of the procedure for determining whether to grant summary judgment also shows the trial court in this case erred:

> Unless the plaintiff's allegations state a claim of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that

> violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

86 L.Ed.2d at 425 (citations omitted). In this case, the plaintiffs' pleadings plainly alleged the violation of clearly established law, so dismissal before discovery was not appropriate, and the factual disputes already apparent in the record, as the Court of Appeals ruled, precluded summary judgment.

In Davis v. Scherer, 468 U.S. 183, 82 L.Ed.2d 139 (1984), the Court addressed a situation similar to that in Forsyth. A state had dismissed an employee without a formal hearing. No case in the Fifth Circuit or this Court "establish[ed] that the appellee was entitled to more elaborate notice of a more formal opportunity to respond, than he did in fact receive." 82 L.Ed.2d at 148 n. 10.

In fact, a Court of Appeals case held to the contrary. Id. at 148. Therefore, this Court held the appellee had not demonstrated a violation of his clearly established constitutional rights and thus qualified immunity was appropriate. Id. Again, this case turned on a purely legal question.

The Court of Appeals decision in this case is also consistent with Malley v. Briggs, 475 U.S. 89 L.Ed.2d 271 (1986). The officer in Malley applied for an arrest warrant, which a magistrate issued. After the warrant was executed, the plaintiffs, who were never charged, sued, claiming the warrant application completely lacked probable cause. This Court remanded, stating the trial court was to determine whether the actions were "objectively reasonable." This principle is entirely consistent with the Eighth Circuit's decision in this case, because in Malley the officer applied for a

warrant. If an officer applies for a warrant, close cases should be decided in his favor. But when a warrant is not used, as in this case, close cases are decided against the officer. United States v. Ventresca, 380 U.S. 102, 106 (1965). (This principle and its application to this case are discussed more thoroughly below in section B).

The real and grave danger of Petitioner's proposed standard is its scope. Under this standard there would be immunity for nearly all discretionary acts. The Petitioner unabashedly states:

> If the legal principle established a bright-line rule sufficient to inform a reasonable officer that his particular conduct violated the Constitution, immunity would not be appropriate. But many, if not most, legal standards do not establish such bright-line rules.

(Pet. Brief 11)(emphasis added).

The Petitioner catologs some Fourth Amendment standards which, if violated in

"case-specific" instances he claims should result in immunity because they do "not in any way enable a government official to determine whether his conduct was permitted under the Constitution." (Pet. Brief 11). These standards are reasonable suspicion, probable cause, and exigent circumstances. Under the Petitioner's avaricious standard, nearly any actor exercising a scintilla of judgment would be entitled to immunity for unconstitutional acts. For, as the Petitioner himself recognizes, nearly all applications of law require judgment.

Under the proposed standard, most persons who suffer "case-specific" constitutional injuries including the completely innocent Creightons would have no redress. And in effect, this standard would eliminate the right by eliminating the remedy.

This insidious proposition would have been condemned by Chief Justice Marshall, who wrote:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 1 Cranch 137, 163, 2 L.Ed. 60, 69 (1803).[3]

The standard urged by the Petitioner would actually impede the development of the law and the bright-line rules he himself sees as the only reliable guides for official action.

Our law has developed case by case. Our constitutional rights have evolved in

---

[3] III Blackstone, Commentaries on the Laws of England 23 (1768) "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."

litigation. After all, the Fourth Amendment is only a single sentence, unlike the commercial code or federal tax regulations. Nothing is new about the principle that litigation is the method by which our rights develop. This process is part of our common law heritage. See generally 10 W. Holdsworth, A History of English Law 650 (1938): "[T]he law of the constitution, the rules . . . are not the source but the consequence of the rights of individuals as defined and enforced by the courts."

The bright-line rules which the Petitioner claims are the only ones he can reasonably rely on simply will not be developed by the courts under his standard. Certainly innocent persons will have no incentive to litigate where a bright-line rule has not been established -- which, as the Petitioner admits, will be most areas of Fourth Amendment law.

The "case-specific" standard proposed by the Petitioner would impede the development of Fourth Amendment law for two reasons. First, the general remedy for Fourth Amendment violations in the criminal context, the exclusionary rule, is co-extensive with qualified immunity in the civil context. See Malley v. Briggs, 475 U.S. ___, 89 L.Ed. 271 (1986)(applying same standard of good faith where there is a warrant in both exclusionary rule and civil immunity contexts.) See also United States v. Leon, 468 U.S. ___ 82 L.Ed. 677 n. 23 (1984); and id. at 734 n. 35 (Brennan, J., dissenting).

Second, other remedies such as declaratory or injunctive relief would not be available in most case-specific violations of the Fourth Amendment. See generally Brinegar v. United States, 338 U.S. 160, 182 (Jackson, J., dissenting).

The extension of qualified immunity sought by Petitioner also conflicts with the doctrine of the Rule of Law, which is central to our constitutional and common law heritage. Since the time of Bracton, the principle that "the King is under God and the law" has been proclaimed and reaffirmed by our judges. Coke lost his position as Chief Justice of the King's Bench, in part, because he quoted Bracton to an enraged King James: "Rex non debet esse sub homine, sed sub deo et lege." 1 Campbell, Lives of the Chief Justices of England 279 (1873); see also R. Pound, The Spirit of Common Law 60-84 (1921).

The principle that the King is under the law does not mean the King could be personally proceeded against, for a corollary maxim was that "the King could do no wrong." The principle was effected by subjecting the King's ministers, through whom he acted, to the regular courts of justice. Blackstone wrote,

after stating the presumption the King could do no wrong:

> But injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom the law, in matters of right, entertains no respect or delicacy; but furnishes methods of determining errors and misconduct of those agents.

3 Blackstone's Commentaries at 255 (emphasis in original); see also 10 W. Holdsworth, History of English Law at 651.

Dicey states one aspect of the doctrine of the Rule of Law meant:

> [E]quality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

A. Dicey, Law of the Constitution 202-203 (9th ed. 1956).

The Rule of Law was also wholly endorsed in the earliest cases of this Court construing the Constitution. In Marbury v. Madison, Chief Justice Marshall wrote:

> The government of the United States has been emphatically termed a government of laws, and not of men. It certainly will cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

1 Cranch at 163.

Of course, there is a tension between any immunity that exempts an official from suit and the doctrine of the Rule of Law. Clearly this Court has recognized immunities, but they must not be extended to "most" areas of law, as the Petitioner urges, especially if the purpose of the immunities will not be served. To decide otherwise is a license for lawlessness.

In formulating qualified immunity, this Court has been primarily concerned

with two perceived evils: (1) is the potential over-deterrence that the threat of damage suits may have on officials; and (2) the disruption of their work by prolonged discovery. If these perceived evils are not eliminated by immunity, or if other methods of eliminating them are available, the Court must not broaden the immunity doctrine because it will have a detrimental effect on the case-by-case development of law and the doctrine of the Rule of Law.

The extension of immunity proposed by Petitioner is not necessary to eliminate these twin evils. It neither eliminates the need for discovery, nor prevents "over-deterrence," because the Justice Department has now adopted a policy of reimbursing officials for attorneys fees and damages resulting from suits. See "Statement of Policy Concerning Indemnification of Department

of Justice Employees, 51 Fed. Reg. 207021 (1986)(amending 28 C.F.R. 50.15).

States have also moved to protect officers from the consequences of damage suits resulting from official duties without depriving those wronged of a remedy. See 5 F. Harper, F. James, & O. Gray, The Law of Torts §29.0 n. 19-20 (2d. ed.)(listing state statutes providing for insurance and indemnification).

The Justice Department's policy decision to indemnify employees for damages resulting from constitutional torts is designed to eliminate the same evil as the broadened immunity the Petitioner urges on the Court. Both remedies are not needed.

The Petitioner has chosen only the most general language from this Court's opinions, then stretched it beyond all reasonable bounds to create a new qualified immunity that would displace official accountability for wrongs and

stunt constitutional growth. The unprecedented standard the Petitioner proposes should be rejected resoundingly.

B.

An Executive Agent Is Not Entitled to Qualified Immunity for Conducting A Warrantless, Presumptively Unreasonable Search Because Immunity in this Context Would Drastically Change the Substantive Fourth Amendment Law.

The Court should reject the qualified immunity standard contrived by the government because it will alter firmly established principles of Fourth Amendment jurisprudence. The Fourth Amendment exigent circumstances doctrine presents unique issues not present in other areas of the law. Specifically, the proposed standard ignores the essential presumption that warrantless searches of a home are presumptively unreasonable, see, e.g.,Welsh v. Wisconsin, 466 U.S. 740 (1984), and that "in . . . doubtful or marginal case(s) a search under a warrant may be sustainable where without one it

would fall," United States v. Ventresca, 380 U.S. 102, 106 (1965). See also United States v. Leon, 468 U.S. __, 82 L.Ed.2d 677, 693 (1984). The sinister result of applying the defense as envisioned by the Petitioner would be to create a new rule: when in doubt, search. The correct rule is, was and should be: when in doubt, get a warrant.

The dilution of the constitutional preference for warrants directly conflicts with this Court's recent efforts to encourage government agents to use warrants by eliminating the exclusionary sanction when warrants are technically deficient. See United States v. Leon. In Leon the court endorsed a presumption of good faith when an officer searches pursuant to a warrant. 82 L.Ed.2d. at 698-699. The warrant process therefore provides an immunity which is nearly unqualified and provides the best

protection for an officer who searches homes. Cf. Malley v. Briggs.

The rule making warrantless searches of homes presumptively "unreasonable" is perhaps the most firmly established rule in Fourth Amendment jurisprudence. See Welsh v. Wisconsin, 466 U.S. at 740 (1983); Welsh v. United States, 451 U.S. 204, 211-12 (1981); Payton v. New York, 445 U.S. 573, 586 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Chimel v. California, 395 U.S. 752, 761 (1969). This principle's origins lie deep in the common law and stem from the sanctity accorded a person's home. Coke reported Semayne's Case early in the 17th century, in which the court stated "that the house of everyone is to him as his castle and fortress." 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603). Unreasonable invasions of colonists' homes spurred the Revolution and led to the

adoption of the Fourth Amendment[4] which specifically mentions "houses." The Court emphasized in Payton:

> In . . . [no setting] is the zone of privacy more clearly defined that when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes that at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.

445 U.S. at 589-90 (quoting Silverman v. United States, 365 U.S. 505, 511 (1960)).

---

[4]See generally T. Taylor, Two Studies in Constitutional Interpretation 38-44 (1969); J. Landyski, Search and Seizure and The Supreme Court 30-48 (1966); N. Lasson, The History and Development of the Fourth Amendment of the United States Constitution 51-105 (1937).

This Court has given the home the greatest protection against searches by executive agents and has repeatedly emphasized that "It is axiomatic that the physical entry of the house is the chief evil against which the wording of the Fourth Amendment is directed." Welsh v. Wisconsin, 466 U.S. at 748 (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)). The court has secured the protection of the home by making warrantless searches presumptively illegal. See Welsh v. Wisconsin.

Here, the government argues that an executive agent, who searches without a warrant in perceived exigent circumstances, should be immune from damages under Bivens. Such a ruling would mean the good faith exception to the exclusionary rule developed in Leon would apply and permit the use of any evidence seized in the criminal context. Malley v. Briggs, ___U.S. ___ (1986) (exclusionary

standard used in warrant context defines qualifed immunity in civil context). Clearly, in other words, the good faith exception of Leon in the warrant context will be subversively extended to the exigent circumstances context. The government has barely addressed this issue, hoping no doubt it will be decided sub silento. See Pet. Brief 20-21 n. 12. The government vaguely suggests that automatic application of the good faith exception would not follow, id., but on the contrary, deciding this case in favor of the government will lead to that result. Indeed, the Court would be justified in suspecting this is one of the government's major if unacknowledged goals in this litigation .

The Court should reject the government's devious approach because to accept it would be to rewrite the substantive law of the Fourth Amendment. There would remain no means of enforcing

the presumption against warrantless searches in so-called "case specific" instances. Justice Jackson recognized this dilemma, dissenting presciently in Brinegar v. United States:

> We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection . . . an illegal search and seizure usually is a single incident, perpetuated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.

338 U.S. 160, 182.

In the exigent circumstances context, absent the essential safeguard of a neutral magistrate, neither injunctive

nor declaratory relief is possible. Therefore, if an effective damages remedy is destroyed -- as it would be under the Government's bright-line theory -- destroyed too would be the precept that "a search under a warrant may be sustainable, where without one it would fall." United States v. Ventresca, 380 U.S. at 106. In shambles, too, would be the principle that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches", Welsh v. Wisconsin, 466 U.S. at 740-50. The police would exchange a heavy burden for a constitutional carte blanch entree into our homes.

This dilution of the warrant requirement cannot co-exist with the frequently repeated admonitition that the protection of the Fourth Amendment depends so greatly upon a magistrate making a probable cause determination, rather than an unrestrained, zealous "officer engaged

in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1947).

The warrant requirement is virtually synonymous with the judiciary's essential role in enforcing the Fourth Amendment. The magistrate ensures at least a neutral determination of probable cause, and scrutiny of the particular description requirement, and the warrant application and return process places the court in a supervisory role over government agents and police. Otherwise, the search is regulated by nothing but the conscience of the officer conducting it. Again as Justice Jackson warned:

> We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit . . . And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless

> officers as well as by the fit and responsible. . . .

Brinegar v. United States, 338 U.S. at 182 (Jackson, J., dissenting).

Warrantless searches of innocent persons' homes will never even come to the judiciary's attention unless civil suits are brought. Indeed, if the Creightons had not sought damages, the judiciary would have remained blissfully unaware of the warrantless searches of three innocent parties' homes. This is nearly perfect illustration of the type of situation where an officer should hesitate, and have a heavy burden of justifying a presumptively illegal act. He is clearly forewarned of potential liability. "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." Harlow v. Fitzgerald, 457 U.S. at 819.

The Government's case is ill-chosen, for it asks and attempts to prove too much. Hard cases may make bad law -- but bad cases, in this Court, cannot make hard law. The Court should note that the denial of qualified immunity does not necessarily mean an officer would not have a defense on the merits of probable cause and exigent circumstances. The elimination of qualified immunity simply subjects the officer to suit, consistently with the common law action for trespass. The Court has consistently said that the common law is one source to weigh when determining the scope of immunity. At common law, an officer searching for a fugitive with a fugitive warrant was not immune if he entered the home of a third person and the fugitive was not there. Sir Mathew Hale wrote:

> If a justice of peace issue a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door

> it is refused or neglected to be done, the officer may break open the door to take him; and the same law is, if it be but for suspicion of felony.
>
> And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger, whose house it is . . .

II M. Hale, Historia Placitorium Coronae 116-17 (1736) (citations omitted); see also Entick v. Carrington, 19 How. St. Tr. 1030, 92 Eng. Rep. 807 (K.B. 1765) (in suit for trespass, rejecting officer's justification of warrant issued by an executive official).

Under Hale's standard and the common law as it existed at the adoption of the constitution, the Petitioner would have been liable in trespass for the search of the Creighton home. The exigent circumstances and probable cause defense would appear to be a contraction of common

law liability for searching the homes of third parties for felons.

The Petitioner fails to address the ill effects his rule would have on Fourth Amendment law. Symbollically, he left out the Fourth Amendment as a "constitutional provision involved" in both his Petition and Brief. Cf. Sup.Ct.R. 21(f) and 34(f).

The Petitioner's proposed standard would work a radical change in the Fourth Amendment. Respondents urge the Court to consider the unique issues presented in the Fourth Amendment context and caution the Court if it is inclined to further extend qualified immunity in other contexts, it should not fashion a doctrine uniformly applicable to all constitutional actions for damages. The Court should reject the government's inexorable quest to reduce the Fourth Amendment to a mere ethical consideration.

C.

The Petitioner Violated the Bright-Line Rule of Steagald v. United States By Searching the Homes of Third Parties Without A Search Warrant.

Significantly, the Petitioner has not cited most directly applicable precedent, Steagald v. United States, in either his Brief or Petition. The facts clearly show that the Petitioner believed the legal basis for his search was the fugitive warrant he possessed and that he did not know that Steagald forbids the search of a third party's home without a search warrant. He told Sarisse Creighton, "I don't need a damn search warrant when I'm looking for a fugitive."[5] (J.A. 50). See also (J.A.

---

[5]On summary judgment all conflicts in fact must be resolved in favor of the non-moving party and all reasonable inferences from the facts must be also drawn in favor of the non-moving party. Adickes v. Kress & Co., 398 U.S. 654, 655 (1962).

54) (Petitioner told Iris Dixon he did notneed a search warrant). (J.A. 58) (Petitioner told Robert Creighton, Sr., he did not need a search warrant).

Another significant fact is that Petitioner never articulated in his affidavit that he searched pursuant to the exigent circumstances exception to the warrant requirement. (J.A, 16-24). He was never confused about applying the Dorman factors, he just did not know about Steagald, one of the brightest bright-line rules limiting police action in the Fourth Amendment area.

Petitioner's counsel interjected the exigent circumstances analysis "ex post facto" in his Memorandum to the trial court, which was entitled:

> Ex Post Facto review of Russell Anderson's actions shows they were in accord with such established statutory or constitutional standards as existed to guide him.

Defendant Russell Anderson's Memorandum of

PUBLISHER'S NOTE:

The following page is unavailable for filming:

50

Points and Authorities at 18 (emphasis in the original) (this document is reprinted in the Appendix Record submitted to the Court of Appeals).

The Petitioner's ex post facto objective "case-specific" confusion should not be the basis for immunity because it is apparent that a bright-line rule governed his conduct.

Therefore, the Petitioner is not entitled to immunity under any such standard.

D.

The Court of Appeals Correctly Reversed the Trial Court Summary Judgment in Favor of The Petitioner Because Discovery was Not Allowed and Factual Disputes, Conflicts Over Inferences to be Drawn From Circumstantial Evidence, and Credibility Issues Precluded Summary Judgment.

Clearly the trial court erred in granting the summary judgment in favor of the Petitioner without allowing any discovery, regardless of which formulation of the qualified immunity standard is applied. The Petitioner confesses this

was error. (See Pet. Brief 33 n. 18) ("Where, as here, the defendant's immunity depends on case specific facts such as the information known to the defendant, a limited amount of discovery may be appropriate.") Thus for this reason alone, the Court of Appeals' reversal was appropriate and must be affirmed.

Furthermore, the Court of Appeals correctly decided that factual disputes precluded summary judgment in favor of the Petitioner and made the case one for the jury to decide under proper instructions on probable cause and exigent circumstances.

First, the information Anderson had linking Dixon to the Creighton home was entirely untrustworthy and presented factual issues to be resolved by a jury. Under the Petitioner's ex post facto analysis, this link is a critical fact for both probable cause and exigent circumstances. He claimed that he "knew"

Vadaain's wife had been staying at the Creightons. Actually he did not have any direct personal knowledge concerning her residence. Anderson states in his affidavit:

> "I knew from my investigation of previous bank robberies committed by Vadaain Dixon that Sarisse Creighton was Vadaain Dixon's sister. I also knew that Cheryl Ann Donlin Dixon, Vadaain Dixon's wife, had resided with Robert and Sarisse Creighton from May of 1983, after her arrest in Dallas for the Omaha bank robbery, to November 9, 1983, the day Vadaain Dixon jumped his bond. I also knew that Vadaain Dixon has stayed on a daily basis at the house of Robert and Sarisse Creighton with Cheryl Ann Donlin Dixon during his four-hour furloughs from the Volunteers of America residence from Otober 13 to approximately November 9, 1983." (J.A. 21).

This statement was bolstered by the affidavit of William Johnson. Johnson averred that Cheryl Dixon, Vadaain Dixon's wife, had informed him she had been staying with the Creightons. He also claimed that Vadaain told him Cheryl was

residing there and that Cheryl told him she was using Sarisse Creighton's and Iris Dixon's automobiles. Finally, he said he told the Petitioner this on November 10, 1983, the day before the bank robbery. (J.A. 38-44).

If Johnson's averments are to be believed, he did not know the whereabouts of Cheryl Dixon after November 1, 1983. Therefore, the Petitioner's averment that he knew Cheryl Dixon stayed at the Creighton's until November 9 -- which the Creightons adamantly deny -- is without foundation and directly conflicts with Johnson's affidavit.

Additionally, the information Johnson, a federal agent, based his information on impeaches his blanket statements and calls into question what he actually told Anderson. (Of course, however, one federal officer cannot create probable cause by relaying false information to another. See Whitely v.

Warden, 401 U.S. 560 (1971)). The record contains twenty-seven furlough cards on which Vadaain Dixon -- a bank robber, fugitive and alleged addict -- listed his destinations from October 13, to November 9, 1983. The cards show Vadaain claimed he visited Cheryl at the Creightons' three times, the last time being October 17, 1983. (Again the Creightons adamantly insist this is false). So, even if Vadaain had visited her there briefly, the cards show he had not been there for three weeks.

Johnson and Anderson's statements about "knowing" Vadaain stayed with Cheryl on his four hour furloughs also is significantly impeached by the fact that they never even went to the Creighton home before August 11. Vadaain had been a fugitive for over two days. Anderson knew about it on the 10th. (Anderson also knew all Vadaain's alleged violent propensities at that time).

Why wasn't a search warrant applied for the Creighton residence at this time? The inference is that Johnson and Anderson knew the information they had -- which may not be what they stated in their affidavits -- would not establish probable cause for a magistrate to issue a warrant.

Even if the facts concerning the attenuated, hypothesized connection between the vaguely described getaway car and the Creighton car which did not match the two-tone description, established both the probable cause and the exigent circumstances, these facts are disputed. The F.B.I. press release said no car had been seen. (See Offer of Proof in Court of Appeals' Appendix Record). Also, a neighbor told the Creightons that the officers had been requesting information about a car with yellow plates. The Creightons' license plates were blue and white.

The Petitioner also does not explain why he searched first Iris Dixon's home, then Minnie Dixon's, then the Creighton's. The brief suggests that he searched in that order because of the relation to the homes to the police department. However, this is an inference drawn in favor of the Petitioner which is not appropriate on summary judgment. The reasonable inference to be drawn is that the Petitioner did not know where Vadaain Dixon was, let alone have strong reason to believe he was as the Creighton home. A further, reasonable inference is that he was conducting a general search of all Dixon's associates with his fugitive warrant in violation of Steagald or just shaking down all of Dixon's relatives for information.

It is a difficult law suit for a humble plaintiff to end up in the United States Suprme Court before even getting discovery or an answer to the complaint.

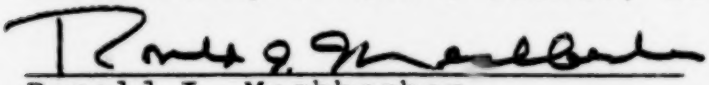
Especially, when the plaintiff's claim is that an agent violated one of the most firmly established bright-line rules in the Constitution. The Constitution should protect innocent people too. We believe that government officials have been subject to suit since the Middle Ages for the claims the Creightons make. The Court will sound the death-knell for most civil rights enforcement through the courts if it were to affirm the district court.

CONCLUSION

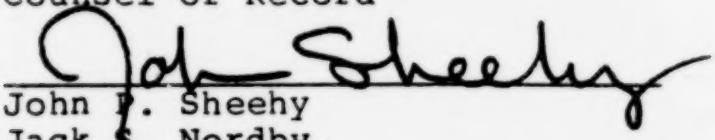
For the reasons stated above, the Court of Appeals' decision reversing the summary judgment against the Respondents should be affirmed in all respects.

Respectfully submitted,

MESHBESHER, SINGER & SPENCE, LTD.



Ronald I. Meshbesher
Counsel of Record



John P. Sheehy
Jack S. Nordby
Counsel for Respondents
1616 Park Avenue
Minneapolis, MN 55404
Telephone: (612) 339-9121

Dated: October 14, 1986

Supreme Court, U.S.
FILED
FEB 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1520

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Beck v. *Ohio*, 379 U.S. 89 (1964) 4, 7
Director General v. *Kastenbaum*, 263 U.S. 25 (1923) 12
Florida v. *Royer*, 460 U.S. 491 (1983) 12
Halperin v. *Kissinger*, No. 84-5095 (D.C. Cir. Dec. 5, 1986) 9
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 1, 2, 5, 8, 10
Malley v. *Briggs*, No. 84-1586 (Mar. 5, 1986) 3, 4, 5, 7
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 5, 8
United States v. *Leon*, 468 U.S. 897 (1984) 7, 8
Whiteley v. *Warden*, 401 U.S. 560 (1971) 4
Wood v. *Strickland*, 420 U.S. 308 (1975) 2, 10

Constitution and regulation:

U.S. Const. Amend. IV 2, 6, 7, 8, 9, 11, 12
51 Fed. Reg. 27022 (1986) (to be codified in 28 C.F.R. 50.15(c)(3)) 10

Miscellaneous:

Restatement (Second) of Torts (1965) 11

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1520

RUSSELL ANDERSON, PETITIONER

v.

ROBERT E. CREIGHTON, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We demonstrated in our opening brief (at 25-29) that the interpretation of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), adopted by the court of appeals, if correct, would eliminate the immunity defense in virtually every *Bivens* action in which the plaintiff's claim is grounded in the Fourth Amendment. Respondents and amicus American Civil Liberties Union (ACLU) do not dispute our conclusion; they enthusiastically embrace that result (Resp. Br. 26-29; ACLU Br. 22-23). This Court's decisions provide no basis for the court of appeals' radical reduction in the protection against monetary liability afforded to law enforcement officers. They instead make clear that an officer may be held liable in damages only if, in view of the law at the time of the events at issue, a reasonable officer would have known that the challenged conduct violated the Constitution.

1. Respondents and the ACLU contend that our position is inconsistent with both this Court's decision in *Harlow* and the policies underlying the qualified immunity doctrine. Their arguments are plainly wrong.

a. The principal argument advanced against our position (Resp. Br. 20-26; ACLU Br. 10-15) is that *Harlow* mandates an objective immunity standard, and that petitioner's immunity defense therefore cannot depend upon a case-specific inquiry into the facts known to law enforcement officers at the time petitioner entered respondents' home. But this Court in *Harlow* was not presented with that issue; moreover, the Court subsequently has acknowledged that such an inquiry may properly be undertaken in connection with the immunity determination.

Prior to the Court's decision in *Harlow*, the immunity defense had "both an 'objective' and a 'subjective' aspect" (*Harlow*, 457 U.S. at 815). A government official forfeited his immunity if he "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury" (*Wood* v. *Strickland*, 420 U.S. 308, 322 (1975)). The *Harlow* Court eliminated the subjective component of this standard, holding that an official's entitlement to immunity turns solely on "the objective reasonableness of [the] official's conduct, as measured by reference to clearly established law" (457 U.S. at 818 (footnote omitted)).

The question in this case is how the objective reasonableness test should be applied when the settled constitutional standard governing a defendant's conduct contains as one element of the constitutional standard itself a case-specific factual inquiry, such as the inquiry into petitioner's knowledge required under the Fourth Amendment. That issue was not addressed in *Harlow*, which eliminated the portion of the immunity test mandating an inquiry into the defendant's subjective good faith. The Court did not purport to deal with the present situation

where the facts known to petitioner are an element of the clearly established constitutional right that is implicated and thus are inescapably relevant in determining whether that right has been violated.

The parties in the present case offer two different approaches for applying *Harlow* in this context. Respondents assert that all case-specific factual inquiry should be precluded. Under that approach, the defendant would be deprived of his immunity whenever the abstract constitutional standard that governed his conduct—in this case the requirements of probable cause and exigent circumstances—was clearly established. Respondents' rule is not only fundamentally inconsistent with *Harlow*; it would result in a drastic reduction in the protection from damages liability afforded to law enforcement officers and other government officials.

We contend that the immunity test encompasses the factual inquiry required by the governing constitutional standard. Thus here the question is whether a reasonable officer could have believed that the facts known to petitioner constituted probable cause and exigent circumstances justifying a warrantless search.[1]

This Court's recent decision in *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), demonstrates that our interpretation of *Harlow* is correct. The issue in *Malley* was whether an officer who executed an arrest warrant could be held liable in damages if a court subsequently determined that the warrant was not supported by probable cause. This Court rejected the defendant's claim that a police officer

---

[1] A third alternative is possible. The official could be entitled to immunity whenever the governing constitutional standard turns upon a case-specific factual inquiry. This alternative would fulfill respondents' desire to eliminate all factual inquiry, but triggers immunity as indiscriminately as respondents would deny it.

is immune from monetary liability whenever the challenged conduct was authorized by a warrant. It further stated, however, that the officer would be immune from damages liability unless "a reasonably well-trained officer *in [the defendant's] position* would have known that his affidavit failed to establish probable cause and that he should not have applied for [a] warrant" (slip op. 9 (emphasis supplied)). Thus, the Court concluded that the resolution of the officer's immunity claim turned upon a case-specific factual inquiry.

The relevant facts in the warrant context are, of course, the facts before the court that issued the warrant. See *Whiteley* v. *Warden*, 401 U.S. 560, 565 n.8 (1971). In the warrantless search context, the analogous inquiry turns upon the facts known to the officer at the time that he performs the search or makes the arrest. See *Beck* v. *Ohio*, 379 U.S. 89, 96 (1964). *Malley* thus makes clear that an inquiry into these facts is appropriate under *Harlow*.

Respondents and the ACLU attempt to distinguish *Malley* based on the existence of a warrant in that case, and suggest that a different rule is appropriate where, as here, there has been no prior judicial authorization of the search (Resp. Br. 25-26; ACLU Br. 29-30). But nothing in *Malley* indicates that the Court's discussion of the *Harlow* standard was influenced by the fact that the police officer acted pursuant to a warrant. Indeed, *Malley* rejected the argument that a special immunity rule should apply when officers act pursuant to a warrant, and affirmed that the immunity of such officers is governed by the general standard announced in *Harlow*. Under *Malley*, therefore, petitioner can be deprived of immunity only if a "reasonably well-trained officer in [petitioner's] position would have known"—from the relevant constitutional standards and the decisions applying those standards in particular circumstances—that the information known to law enforcement officers about Vadaain Dixon did not

establish probable cause and exigent circumstances. *Malley* v. *Briggs*, slip op. 9; see also *Mitchell* v. *Forsyth*, 472 U.S. 511, 535 n.12 (1985).[2]

b. Respondents' contention that petitioner's immunity should not turn upon an inquiry into the particular facts of this case suffers from a more basic flaw: it is wholly incompatible with *Harlow*'s conclusion that a government official should be subjected to damages liability only when the official "could be expected to know that [his] conduct would violate statutory or constitutional rights" (*Harlow*, 457 U.S. at 819). As we showed in our opening brief (at 25-29), the legal standards identified by the court of appeals—the requirements of exigent circumstances and probable cause—do not, without reference to a particular factual context, provide any guidance in determining whether a particular search would violate the Constitution. And the search for "clearly established law" becomes meaningless if the legal rule need not be sufficiently particular to enable a reasonable official to determine whether his conduct is constitutional. Indeed, clearly

---

[2] The ACLU mischaracterizes (Br. 7, 37) our position by asserting that under our approach an official will be divested of immunity only if "the particular conduct of which [he] has been accused has previously been held illegal" and that immunity will be available to law enforcement officers "whose conduct indicates ignorance or willful disregard of controlling cases in this Court." In fact, a prior decision addressing the precise factual circumstances is not required, and the officer's actual ignorance of clearly established law is irrelevant. The relevant inquiry is the one framed by this Court in *Malley*—whether a reasonably competent officer in that officer's position, *i.e.*, possessed of the knowledge that officer had, would have recognized that the conduct was unlawful (slip op. 9 & n.8).

The ACLU also states that the standard for which we contend is a departure from *Harlow* because it inquires "whether the official 'could reasonably have believed that his (action) was legally justified' " (ACLU Br. 33-34, quoting Pet. Br. 30). But that is virtually the precise language that the Court used in *Harlow* and *Malley*. See *Harlow*, 457 U.S. at 818, 819; *Malley*, slip op. 9 & n.8.

established law always can be found at some level of generality, and the Court has rejected the argument that the existence of a general constitutional standard is by itself sufficent to defeat an immunity claim (see Pet. Br. 15-20).

Respondents do not seriously contend that the concepts of probable cause and exigent circumstances themselves enable an officer to determine the legality of particular conduct. Instead, they assert simply (Br. 15-35) that the existence of a settled legal standard is sufficient to eliminate immunity. That rule, of course, would drastically reduce the protection provided by *Harlow* (see Pet. Br. 25-29).

Amicus ACLU argues (Br. 18-21, 25-29, 39-45) that the generality of the applicable Fourth Amendment standards is beside the point because those standards themselves protect law enforcement officers by providing a margin for official error. As we showed in our opening brief (at 25-29), however, an officer would be subject to damages liability whenever he violated the Fourth Amendment, no matter how close the issue or how understandable the officer's error. The Fourth Amendment standards thus do not provide the "ample room for mistaken judgments" that the immunity defense is designed to ensure (*Malley*, slip op. 7).[3]

---

[3] In attempting to support its position, the ACLU cites (Br. 19-20) as "the kind of reasonable error that is incorporated into the probable cause concept" the situation in which "an officer arrests a robbery suspect on the strength of a mistaken identification." But where an officer relies on an identification provided by a witness and the identification turns out to be mistaken, the officer has not committed any error at all. In addition, the ACLU's example gives no comfort to the officer who makes an erroneous judgment by, for example, mistakenly concluding that the facts that he knows amount to probable cause. This Court has recognized the latter determination to be extremely difficult (see Pet. Br. 28-29) and, under the ACLU's theory, the officer would be liable in damages every time that he erroneously concludes

Moreover, the ACLU's attempt (Br. 23-28, 39-40) to equate the probable cause standard with *Harlow*'s objective reasonableness standard is plainly wrong. Probable cause looks to whether the law enforcement officials have information "sufficient to warrant a prudent man" in arriving at certain conclusions about the likelihood of criminal conduct or the presence of evidence (*Beck* v. *Ohio*, 379 U.S. at 91). The *Harlow* standard, by contrast, turns upon a comparison of an official's conduct with the then-existing caselaw, and asks whether the conduct violated clearly established rights. It is thus quite possible that a search may violate the Fourth Amendment for lack of probable cause, but nonetheless satisfy the *Harlow* test because the officer's conduct was not clearly unconstitutional under the case law at the time the search occurred.

Indeed, this Court's decision in *Malley* rests squarely upon the conclusion that an officer's conduct may violate the Fourth Amendment and yet be objectively reasonable within the meaning of *Harlow*. As the Court stated, even an officer who violates the Fourth Amendment is protected by immunity unless "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause." Slip op. 9; see also *United States* v. *Leon*, 468 U.S. 897, 922-923, 926 (1984) (finding that officer's reliance on a warrant was objectively reasonable even though the warrant was not supported by probable cause).[4]

---

that a set of facts amount to probable cause. Without any room for error, officers may well become timid and protect themselves from monetary liability by refusing to proceed against a wrongdoer absent overwhelming evidence of criminal activity. Although the ACLU endorses that result (Br. 41 n.6), such a chilling effect upon legitimate government conduct is precisely what the *Harlow* standard is designed to avoid (see Pet. Br. 23-25).

[4] Respondents warn darkly (Br. 40) that "one of the government's major if unacknowledged goals in this litigation" is the extension of

c. Respondents (Br. 20-22) and the ACLU (Br. 33-39) also argue that any factual inquiry into the defendant's knowledge is contrary to *Harlow* because it would transform what should be a wholly legal inquiry into a fact-specific determination, and make impossible the expeditious resolution of immunity claims on motion for summary judgment. But *Harlow* did not indicate that all immunity claims would raise solely legal issues or that every case could be determined on summary judgment. Indeed, some facts must be adduced prior to the adjudication of every immunity claim so that the court may determine the conduct that is in issue and the constitutional standard by which that conduct is to be measured. The Court in *Harlow* stated only that its standard would "permit the resolution of many insubstantial claims on summary judgment." 457 U.S. at 818; see also *Mitchell* v. *Forsyth*, 472 U.S. at 526-527 (recognizing that an immunity defense may be based upon facts uncovered through discovery). Frequently, there will be no dispute about the facts, and a court will be able to adjudicate the immunity claim on motion for summary judgment. Where the facts

---

the good faith exception recognized in *United States* v. *Leon, supra*, to the warrantless search context. However, the question whether to broaden the good faith exception as it applies to the exclusion of evidence involves considerations other than those relevant to the inquiry under *Harlow*, and a decision for petitioner in this case would not be determinative of that issue (Pet. Br. 20-21 n.12).

Respondents (Br. 35-39) and the ACLU (Br. 44-45) suggest that the rule for which we contend will somehow alter the probable cause and exigent circumstances standards themselves. That is obviously wrong. The question in this case is the meaning of the immunity standard adopted in *Harlow*, not the interpretation of these Fourth Amendment principles, which apply both in suppression hearings and in determining whether a *Bivens* defendant actually violated the Constitution. Respondents' claim (Br. 27-29) that the rule for which we contend will hinder the development of Fourth Amendment law is also flawed. Those issues will continue to be litigated, as they have been in the past, in suppression hearings in criminal cases.

are in dispute, some discovery may be warranted; but summary judgment subsequently may be appropriate if the evidence developed in discovery resolves the factual dispute.[5]

Also, respondents' position—that the need to avoid discovery justifies a drastic reduction in the immunity available to law enforcement officers in the Fourth Amendment context—is quite bizarre in view of the Court's determination that the monetary liability of government officials should be limited to situations where the officials could have known that their conduct violated the Constitution. Faced with a choice between permitting some discovery and depriving an officer of immunity, respondents choose to eliminate immunity. That conclusion simply cannot be reconciled with the principles that underlie this Court's decision in *Harlow*.[6]

2. Respondents argue (Br. 33-35) that the indemnification policy recently adopted by the Department of Justice eliminates the need for any "broadened" immunity doctrine. The policy "permits, but does not require, the De-

---

[5] The defendant in a case presenting a Fourth Amendment claim typically will file a motion for summary judgment on immunity grounds supported by an affidavit listing the facts that he knew at the time of the challenged conduct. The issue can be resolved on summary judgment if (1) the plaintiff does not challenge the facts set forth in the affidavit, or (2) the defendant would be entitled to immunity even if the facts were as the plaintiff asserts them to be. Where necessary in view of the nature of the facts in issue, the court may order limited discovery before ruling on the motions for summary judgment.

[6] This case does not present any question regarding the application of the *Harlow* test when the established constitutional standard that governed the defendant's conduct has as an element and therefore directs an inquiry into a government official's purpose; purpose is not an element of the "constitutional tort" in this case and thus petitioner's motivation is irrelevant under the Fourth Amendment (see pages 11-12, *infra*). In defending other individuals sued in *Bivens* actions where purpose (as contrasted to factual beliefs) does constitute an element of the "constitutional tort", the United States has advanced the

partment to indemnify a Department employee who suffers an adverse verdict, judgment, or other monetary award provided that the actions giving rise to the judgment were taken within the scope of employment and that such indemnification is in the interest of the United States, as determined by the Attorney General" (51 Fed. Reg. 27022 (1986)). The decision whether a Department of Justice official will be indemnified generally will not be made until after the entry of an adverse judgment against the official (*ibid.*, to be codified at 28 C.F.R. 50.15(c)(3)).[7] And in any event this policy does not extend to other federal officials—*e.g.* agents of the IRS, Customs Service, Coast Guard, etc.—who also exercise responsibilities that may lead to potential claims under the Fourth Amendment.

This indemnification policy is irrelevant to the question presented in this case regarding the scope of immunity under *Harlow*. The basic reason for conferring immunity on government officials, this Court has observed, is that an official would be deterred from forcefully exercising his authority if he could be required to answer in damages for actions that were not unreasonable in light of the circumstances at the time they were undertaken. *Wood* v. *Strickland*, 420 U.S. at 319-320; Pet. Br. 23-25. Because the decision whether to indemnify an official generally is not made until after the entry of an adverse judgment, a Justice Department official will not know at the time that he acts whether or not he will be indemnified. The indemnification policy thus will not eliminate the chilling effect

---

view that the rationale of *Harlow* reasonably extends to barring the probing of a defendant's subjective purpose. *Halperin* v. *Kissinger*, No. 84-5095 (D.C. Cir. Dec. 5, 1986).

[7] As an agent of the Federal Bureau of Investigation at the time of the events at issue in this case, petitioner would be eligible for indemnification under this policy.

that flows from the fear of monetary liability, and immunity remains an important protection assuring vigorous conduct by public officials.[8]

3. Both respondents and the ACLU make a variety of erroneous statements concerning petitioner's entitlement to immunity in this case. As we explained in our opening brief (at 30-34), we do not seek the resolution of petitioner's immunity claim by this Court, but urge a remand to allow the lower courts to apply the proper legal standard to petitioner's immunity claim. To avoid any misunderstanding regarding the issues in this case, however, we will briefly respond to these misstatements.

First, respondents plainly err in asserting (Br. 14, 19-20 & n.2, 51-52) that we have "confess[ed] error" by stating that discovery may be appropriate on remand. The court of appeals in this case rejected petitioner's immunity claim on the merits. If this Court reverses the court of appeals' judgment and remands the case for further proceedings, the district court will be free to order the discovery that it deems appropriate.[9]

---

[8] The ACLU argues (Br. 31-33) that the immunity rule for which we contend is inappropriate because an officer was not entitled to immunity at common law if a warrantless arrest subsequently was found to be unlawful. Even if the ACLU's argument were true, it would be irrelevant because this Court stated in *Harlow* that the immunity standard there adopted applies to any "government official[] performing discretionary functions." 457 U.S. 818; see also *id.* at 821 (citation omitted) (Brennan, J., concurring) (the *Harlow* standard "applies 'across the board,' to all 'government officials performing discretionary functions' "). Moreover, it is not at all clear that petitioner would not have been entitled to immunity at common law. One of the authorities cited by the ACLU recognizes the immunity defense in this context, stating that an officer "is protected in every case where he acts under a reasonable mistake as to the existence of facts which * * * justify an arrest without a warrant" (Restatement (Second) of Torts § 121 comment i (1965)).

[9] We discussed the considerations governing the availability of discovery in our opening brief (at 33-34 n.18). Contrary to respond-

Second, both respondents (Br. 48-51) and the ACLU (Br. 28-29 n.5, 37, 40-41) repeatedly refer to petitioner's subjective beliefs regarding his authority to enter respondents' home and thus suggest that those beliefs are somehow relevant to the immunity inquiry. But this Court has made clear that a law enforcement officer's subjective beliefs are irrelevant under the Fourth Amendment. *Florida* v. *Royer*, 460 U.S. 491, 507 (1983) (plurality opinion); *Director General* v. *Kastenbaum*, 263 U.S. 25, 27-28 (1923); Pet. Br. 30 n.16. And, as we have discussed, *Harlow* eliminated the general inquiry into the defendant's subjective intent required under the prior immunity standard. Thus, petitioner's subjective beliefs are wholly irrelevant here.

Third, respondents argue (Br. 51-58) that the court of appeals properly reversed the district court's determination that petitioner's actions complied with the requirements of the Fourth Amendment. We did not seek review of the court of appeals' determination that—on this record—the question whether petitioner violated respondents' Fourth Amendment rights presents a jury issue (see Pet. App. 7a). All that we seek here is the reversal of the court of appeals' improper elimination of petitioner's immunity defense so that on remand petitioner will have an opportunity to establish his entitlement to immunity under the correct legal standard.

---

ents' assertion (Br. 19-20 & n.2) we did not concede that discovery would be appropriate in this case. That is a question to be resolved by the district court on remand.

For the foregoing reasons, and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40212

(6)

No. 85-1520

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL ANDERSON,

Petitioner,

—v.—

ROBERT E. CREIGHTON, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

MICHAEL AVERY
Avery & Friedman
6 Beacon Street
Boston, MA 02108
(617) 367-2626

SETH KREIMER
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, PA 19104
(215) 898-7447

DAVID RUDOVSKY*
Kairys & Rudovsky
1425 Walnut Street
Philadelphia, PA 19102
(215) 438-4541
**Counsel of Record*

JACK D. NOVIK
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

51PP

TABLE OF CONTENTS

	Page
Interest of Amicus.	1
Statement of the Case.	2
Summary of Argument.	6
Argument:	
Because The Law Under The Fourth Amendment Requiring Both Probable Cause And Exigent Circumstances Was Clearly Established, Petitioner Has No Entitlement To A Qualified Immunity Defense	10
A. Harlow v. Fitzgerald established an objective legal test to determine qualified immunity.	10
B. The governing legal standard was clearly established.	14
C. The doctrines of probable cause and exigent circumstances, based as they are on settled standards governing how a reasonable officer should act, are not subject to an immunity defense where an officer enters a home without a warrant.	21
D. The test proposed by petitioner would work a radical change in the scope and nature of the immunity defense.	33
E. The purposes of qualified immunity would be undermined by petitioner's new doctrine.	39
Conclusion.	48

TABLE OF AUTHORITIES

Cases:	Page
Beck v. Ohio, 379 U.S. 89	27,44
Blackburn v. Snow, 771 F.2d 556	23
Brinegar v. United States, 338 U.S. 160	27
Clark v. Beville, 730 F.2d 739	23
Coon v. Ledbetter, 780 F.2d 1158	23
Creamer v. Porter, 754 F.2d 1311	23
Davis v. Scherer, 468, U.S. 183 (1984)	passim
Deary v. Three Un-Named Police Officers, 746 F.2d 185	23
Director General of Railroads v. Kastenbaum, 263 U.S. 25	31
Entick v. Carrington, 19 How. St. Tr. 1030	32
Floyd v. Farrell, 765 F.2d 1	
Harlow v. Fitzgerald, 457 U.S. 800	45 passim
Henry v. United States, 361, U.S. 98	21
Hobson v. Wilson, 737 F.2d 1	42
Illinois v. Gates, 462 U.S. 213	27
Llaguno v. Mingey, 763 F.2d 1560	24

Cases:	Page
Malley v. Briggs, 106 S. Ct. 1092	29,31
Mitchell v. Forsyth, 105 S. Ct. 2806	passim
Moore v. Marketplace, Restaurant, Inc. 754 F.2d 1336	25
Payton v. New York, 445 U.S. 573 (1980)	14
Pennsylvania v. Mimms, 434 U.S. 106	40
Saldana v. Garza, 684 F.2d 1159	45
Slakan v. Porter, 737 F.2d 368	23
Steagald v. United States, 451 U.S. 204 (1981)	14
Tennessee v. Garner, 105 S.Ct. 1694	35
Terry v. Ohio, 392 U.S. 1	40
Texas v. Brown, 460 U.S. 730	19,37
Trejo v. Perez 693 F.2d 482	23
United States v. Brignoni - Ponce, 422 U.S. 873	38
United States v. Leon, 468 U.S. 897	43

TABLE OF AUTHORITIES

Cases:	Page
United States v. Perez, 700 F.2d 1232	17
United States v. Selberg, 630 F.2d 1292	18
Welsh v. Wisconsin, 466 U.S. 740 (1984)	16
Constitution and Statutes:	
U.S. Const. Amend IV	passim
Miscellaneous:	
Newman, Suing the Law-breakers; Proposals To Strengthen The Section 1983 Damage Remedy, 87 Yale L.J. 447 (1978)	26
Restatement (Second) of Torts, §121 Comment i	32

INTEREST OF THE AMICUS CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization which has over 250,000 members. Since its founding in 1920, ACLU has been concerned with the protection of fundamental rights and individual liberties that are guaranteed by the Constitution of the United States.

---

1. The parties have consented to the filing of the brief, and their letters of consent have been filed with the Clerk of the Court under Rule 36.2 of the Rules of this Court.

STATEMENT OF THE CASE[2]

This case arises from a warrantless search of respondents' home by petitioner, an FBI agent, and several state police officers. These officers were searching for one Vadaain David Dixon, a suspect in a bank robbery that had occurred over five hours before the search at issue.

1. In searching for the suspect, petitioner first searched the homes of Iris Dixon (the suspect's mother) and Minnie Dixon (his grandmother) before going to respondent's home, where they arrived at 8:40 p.m. Respondent Robert Creighton requested to see a search warrant, but was told by a Sergeant De Noma, petitioner's colleague in the search, "we don't have a search warrant. I don't need a search warrant; you watch

---

2. Amicus adopts the statement of Respondents. We highlight here the critical facts on the issue presented.

too much T.V." J.A. 44. A warrantless search ensued. Respondent Sarisse Creighton stated that when she asked for a warrant, petitioner stated, "I don't need a search warrant when I'm looking for a fugitive." J.A. 50.

2. On the issue of exigent circumstances, the record makes clear that petitioner did not even consider whether he needed a warrant to enter, and if so, under what circumstance he would be justified in entering without one. See Affidavits of Robert and Sarisse Creighton, supra.

The record shows that there was no immediate or continuous pursuit of the suspect. Similarly, there is no assertion by petitioner that he had an actual or reasonable belief that evidence would be destroyed, or that the suspect would escape if the officers sought a warrant. J.A. 16-23.

3. With regard to the facts relating to whether there was probable

cause to believe that Vadaain Dixon would be at respondent's home, the record shows the following:

Petitioner claims he had information that Dixon's wife lived with respondent up to November 9th (the robbery occurred November 11th), J.A. 21, but the source of his information, Probation Officer William Johnson, contradicts him, stating that the latest information he had was November 1st. J.A. 39, 41-42. Further, petitioner represented that "Vadaain Dixon has stayed on a daily basis at the house of (respondent's) with Cheryl Ann Donlin Dixon (his wife) during his four-hour daily furloughs from the Volunteers of America residence from October 13 to approximately November 9, 1983," J.A. 21. But Probation Officer Johnson said only that "Cheryl Dixon was picking Vadaain Dixon up on a daily basis <u>at the Volunteers of America</u> so that Vadaain Dixon and Cheryl Dixon could spend his daily furloughs

together." J.A. 39 (emphasis added). No basis is provided for petitioner's assertion that the suspect spent time, every day, at respondent's house.

The information relating to the getaway car did not match respondent's automobile. The getaway car was described as two-tone burgundy or maroon and silver (or possibly a darker color), and possibly a Buick. Petitioner determined that respondent's car was a solid, single color, burgundy or maroon Oldsmobile.

4. The trial court granted summary judgement before any discovery was allowed on the facts relating to probable cause and exigent circumstances.

SUMMARY OF ARGUMENT

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court established an objective test to determine if an official was entitled to qualified immunity. If the plaintiff alleges facts that demonstrate a constitutional violation, the court is to determine, at the summary judgment stage prior to full discovery, whether the alleged conduct violated clearly established law of which a reasonable person would have known. Whether there has in fact been a constitutional violation is reserved for the trial itself if no immunity is found.

Petitioner's claim that an official is entitled to immunity where he "could reasonably have believed that his warrantless entry . . . was justified," Brief, at 30, would work a radical change in the governing Harlow standard. It would turn an "objective" and "purely legal test", Mitchell v. Forsyth, 105 S. Ct. 2806, 2816, n.9 (1985) into a

subjective, fact-bound determination. Further, it would (1) defeat Harlow's decided preference for efficient and early resolution of the immunity issue; (2) confuse the distinct legal immunity and factual violation of law inquiries; and (3) effectively immunize police misconduct, particularly in the Fourth Amendment area.

Petitioner also appears to claim that unless the particular conduct of which an official has been accused has previously been held illegal, then he acted reasonably and thus is entitled to immunity. This argument simply ignores reality. Fourth Amendment cases arise in an almost infinite variety of factual situations. Under petitioner's standard, almost every official could claim that he did not know that the law applied to his particular conduct no matter how clear the law. It is illogical to argue that where an officer

has acted unreasonably, that is, without probable cause and exigent circumstances, he can claim that his conduct was reasonable. Moreover, petitioner suggests a vagueness in Fourth Amendment principles where none exists.

This case demonstrates the fallacy of petitioner's position. Not only is the law of warrantless arrests in the home, of exigent circumstances, and of probable cause quite clear, but it provides quite explicit standards of conduct. On the facts as alleged by respondent there is no question that the officer violated these clearly established legal standards, of which he reasonably should have been aware. Whether petitioner in fact had probable cause and whether there were exigent circumstances is a question for a jury after a trial.

In Harlow, this Court struck a

delicate balance that fully protects the officer, yet allows redress for misconduct. On summary judgment, the officer has immunity if the law was not clearly established, and at trial he has a defense if the facts show that he acted reasonably under the circumstances, i.e., the probable cause and exigent circumstances standards have been met. Petitioner's new approach, which would wreck the balance struck in Harlow, must be rejected.

ARGUMENT

BECAUSE THE LAW UNDER THE FOURTH AMENDMENT REQUIRING BOTH PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES PRIOR TO A WARRANTLESS ENTRY INTO A HOME WAS CLEARLY ESTABLISHED, PETITIONER HAS NO ENTITLEMENT TO A QUALIFIED IMMUNITY DEFENSE.

A. Harlow v. Fitzgerald Established An Objective Legal Test To Determine Qualified Immunity.

In Harlow v. Fitzgerald, supra, this Court redefined the doctrine of qualified immunity and announced a fundamental change in its scope and application. To allow for pretrial adjudication of the issue, the Court discarded the subjective element of good faith and focused instead on the state of the law at the time of the alleged constitutional violation.

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

> would have known . . . Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment . . . Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Id. at 818-819. Harlow created an objective test for determining whether the applicable legal standard was clearly established. The subjective beliefs of the official involved -- whether malicious or in good faith-- are now irrelevant to the issue of

immunity.[3] Once a court determines that a legal standard governing the governmental action at issue was clearly established, there is no qualified immunity. The factual question whether the officer's conduct violated the established constitutional standard is resolved at trial.

The Court's emphasis on the "objective reasonableness" of an official's conduct "as measured by reference to clearly establish law," Harlow, supra, at 818, was followed in Davis v. Scherer, 468 U.S. 183 (1984) and Mitchell v. Forsyth, 105 S. Ct. 2806 (1985). Davis leaves no doubt about the impact of Harlow upon the qualified

---

[3]. The intent, subjective belief and reasonableness of the official may, however, be quite relevant to whether a constitutional violation occurred,but this is an inquiry independent of immunity.

immunity defense. The Court made it clear that the "totality of the circumstances" test of previous cases, which mandated inquiry into both the objective reasonableness of the defendant's conduct and the subjective state of mind, has been replaced by Harlow's formulation. The Court noted that Harlow had "rejected the inquiry into state of mind in favor of a wholly objective standard." Davis, supra, at 191.

In Mitchell v. Forsyth, supra, the Court ruled that warrantless national security electronic surveillance conducted two years before such conduct was first held to be unconstitutional (and where the Court had expressly reserved decision on the question) was not actionable in light of the plainly unsettled nature of the governing principles. In analyzing the nature of a trial court's decision on a summary

judgment motion seeking qualified immunity, the Court held:

> All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. Id. at 2816 (emphasis added).

B. The Governing Legal Standards Were Clearly Established.

1. The Law Was Clear That, Absent Probable Cause And Exigent Circumstances, A Warrantless Arrest In The Home Violates The Fourth Amendment.

In Payton v. New York, 445 U.S. 573 (1980) this Court resolved a long-standing Fourth Amendment issue by requiring police officers to obtain a warrant before effectuating an arrest of a felony suspect inside that person's house. Steagald v. United States, 451 U.S. 204 (1981) extended the Payton principle to searches of homes of third parties, requiring a search warrant

prior to entry of these premises. In a search for felony suspects, the Court ruled that an arrest warrant

> did absolutely nothing to protect petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, petitioner's only protection from an illegal entry and search was the agent's personal determination of probable cause. In the absence of exigent circumstances, we have consistently held that such judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant.

Id. at 212-214.

2. The Grounds For Claiming Exigent Circumstances Were Well Established.

The important privacy interests

protected by the warrant requirement are not to be lightly subordinated to claims of exigent circumstances. In Welsh v. Wisconsin, 466 U.S. 740 (1984), the Court reiterated the "few. . . and carefully delineated" exceptions to the warrant requirement and emphasized that "the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." Id. at 749-50. Indeed, such a search is per se unreasonable, unless exigent circumstances are shown.

> [T]he Court decided in Payton v. New York, supra, that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances.
>
> . . . .
>
> [T]he Court has recognized only a few such emergency conditions, see, e.g., United States v. Santana, 427 U.S. 38, 42-43 (1976)

> (hot pursuit of a fleeing felon); Warden v. Hayden, 387 U.S. 294 (1967) (same); Schmerber v. California, 384 U.S. 757, 770-771 (1966) (destruction of evidence); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see Santana, supra.

466 U.S. at 749-750.[4]

The Eighth Circuit had also clearly delineated the limited situations in which the exigent circumstances exception would apply. See, United States v. Perez, 700 F.2d 1232, 1237

---

[4]. Moreover, Welsh indicates the general agreement among the Justices of the limited grounds for claiming exigent circumstances (a clearly demonstrated need to prevent escape, injury to others or destruction of evidence) that would in fact be frustrated by resort to the warrant process. Welsh, supra, at 749-750; Id. at 759. (White, J., dissenting).

(8th Cir. 1983), cert. denied,104 S.Ct. 3587 (1984); United States v. Selberg, 630 F.2d 1292, 1295-96 (8th Cir. 1980).

Under this standard, petitioner has to demonstrate at trial that he had reason to believe that the suspect would destroy evidence, injure others, or escape. Surely no such showing has been made pre-trial. There is no evidence of hot pursuit, no reason to believe that the suspect would injure his own family members, and there is no basis for believing that any evidence would be destroyed. And given the critical fact that a warrant could be secured by a quick phone call, see Fed. R. Crim. P. 41(c), any pre-trial claim to exigent circumstances on this record is simply untenable.

3. The Test For Determining Probable Cause Was Well Established.

Both the concept and application of

the probable cause requirement are well settled. In Texas v. Brown, 460 U.S. 730, 742 (1983), this Court stated:

> "As the Court frequently has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' Carroll v. United States, 267 U.S. 132, 162 (1925), that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical probability that incriminating evidence is involved is all that is required. Brinegar v. United States, 338 U.S. 160, 176 (1949).

Thus, for example, if an officer arrests a robbery suspect on the strength of a mistaken identification,

probable cause exists for the arrest even though the defendant is later found innocent. Indeed, this type of mistake is exactly the kind of reasonable error that is incorporated in the probable cause concept. No doctrine of "good faith" or qualified immunity is necessary to provide the police officer with a defense, because he already has one.

This case presents no difficulty in determining whether the law was clearly established. The constitutional principle at issue -- that no search of a third party's house for a suspect can be conducted without a warrant unless there is both probable cause to believe that the suspect is present and exigent circumstances excusing the absence of a warrant -- is a precise subprinciple of the Fourth Amendment, clearly establishing the limit on governmental authority in a particular area of police work. No narrower principle is needed

to define the limits of police authority and this Court has provided the essential guidelines for the probable cause and exigent circumstances determinations.

Thus, when plaintiffs allege facts that, if true, would entitle them to relief under clearly established legal principles, the constitutionality of police activity should be determined on a fact-bound, case by case analysis under which the officer will receive the full benefits and protections of the reasonableness standard that controls probable cause and exigent circumstances determinations. This standard "protects both the officer and the citizen." Henry v. United States, 361 U.S. 98, 102 (1959).

C. The Doctrines Of Probable Cause And Exigent Circumstances, Based As They Are On Settled Standards Governing How A Reasonable

Officer Should Act, Are Not Subject To An Immunity Defense Where An Officer Enters A Home Without A Warrant.

Under Payton and Steagald petitioner has the burden of demonstrating both probable cause to believe that the suspect would be found in respondent's premises and that exigent circumstances existed to justify the entry without a warrant. These are factual inquiries that are not amenable to resolution on summary judgment under Harlow. Because the standards governing these constitutional issues are well settled, the question is not what constitutional rule applies; rather, it is whether a given set of facts violates the standard established by a known rule. Once the trier of fact determines that an officer acted without probable cause or exigent circumstances, i.e., that he acted unreasonably, the inquiry ends. A defendant cannot then claim a qualified

immunity where, under a clearly established constitutional principle, he has by definition acted unreasonably and in violation of the Constitution.

The Courts of Appeals have widely recognized that probable cause is a "clearly established" constitutional standard and therefore acts undertaken without probable cause are not subject to a qualified immunity. See, e.g., Creamer v. Porter, 754 F.2d 1311 (5th Cir. 1985); Deary v. Three Un-Names Police Officers, 746 F.2d 185 (3d Cir. 1984); Clark v. Beville, 730 F.2d 739 (11th Cir. 1984); Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982). See also Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984); Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986); Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985). Petitioner ignores this logical and well-settled application of Harlow to the fact-bound probable cause question. He calls for a

new standard that would provide immunity if an official "reasonably" should not have known that his particular conduct was unreasonable.

In Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985) (en banc), the Court analyzed the problem as follows:

> The good sense of Harlow in withdrawing the issue of immunity from the jury is particularly evident in a case such as this where the police are charged with having acted without probable cause. The question whether they had probable cause depends on what they reasonably believed with reference to the facts that confronted them, as the judge instructed in the passage we quoted earlier. To go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that

> they were acting reasonably is to confuse the jury and give the defendants two bites at the apple.

Id. at 1569 (emphasis added).

In Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1358 (7th Cir. 1985), Judge Posner concurring, stated:

> But what was perfectly clear when these arrests were made, as now, is that an arrest is not proper without probable cause. So if there was no probable cause, there was no immunity; if there was probable cause, then, as just pointed out, there was immunity. The issue of immunity will thus be resolved automatically by the jury's resolution of the issue of probable cause;. . . (emphasis added).

Judge Jon O. Newman has cogently explained why no immunity should be permitted where the officer has failed to show probable cause:

But however well-intentioned this second ingredient of the good faith defense, it involves nearly circular reasoning that promotes confusion and sometimes defeats meritorious claims. For example, the victim's cause of action for an arrest in violation of his Fourth Amendment rights requires an arrest without probable cause. To make out his case, the plaintiff must establish that a reasonably prudent police officer, under all the circumstances, would not have had probable cause to believe that he had committed a crime. Then, under Bivens, the officer still has a defense if acted in good faith and has a reasonable belief in the validity of his action, that is, if he reasonably believed that he did have probable cause. But if the plaintiff's own case requires him to show an arrest that was not reasonably based on

> probable cause, what does the defense mean? Surely the officer could not reasonably believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.

Newman, Suing The Lawbreakers: Proposals to Strengthen the Section 1983 Damage Ready, 87 Yale L.J. 447, 460 (1978).

This Court's cases defining probable cause demonstrate the broad latitude given police officers to search or arrest. See, e.g., Brinegar v. United States, 338 U.S. 160 (1949); Beck v. Ohio, 379 U.S. 89 (1964); Illinois v. Gates, 462 U.S. 213 (1983). If an officer acts upon information which is insufficient to meet this not very demanding test, it is untenable for petitioner to claim that the officer is entitled to immunity on a theory that

the law had not clearly established that his particular conduct was illegal. If an officer did not have a sufficient basis to make a "practical, common-sense" decision that a "fair probability" of crime or evidence existed, he cannot have acted in an objectively reasonable manner. Similarly, if he cannot show hot pursuit, danger of destruction of evidence, or danger to others, he cannot reasonably claim that exigent circumstances excuse the lack of a warrant. As the Court below recognized, further discovery is necessary since this case presents sharp factual disputes on exactly what information petitioner relied. 766 F.2d at 1273-75.[5]

---

[5] Indeed, petitioner did not even consider whether he needed a warrant to enter, and if so, under what circumstances he would be justified in entering without one. Respondent Robert Creighton submitted an affidavit stating that a member of the search party (which included petitioner) told him in response to

Petitioner's reliance on Malley v. Briggs, 106 S.Ct. 1092 (1986), is misplaced. In Malley, the Court again stressed the "objectively reasonable" standard in determining qualified immunity. In the context of a case in which the officer did exactly what the Fourth Amendment requires, submitting the facts to a neutral magistrate for determination of probable cause, the Court recognized "where officers of reasonable competence could disagree on (the) issue," immunity would be granted. Once the magistrate has acted, the

---

his request to see a warrant: "We don't have a search warrant. I don't need a search warrant; you watch too much TV." J.A. 44. Respondent Sarisse Creighton stated that when she asked petitioner for a search warrant he said "I don't need a search warrant when I'm looking for a fugitive." J.A. 50. Plainly, petitioner ignored the teachings of Payton and Steagald. It is, therefore, facetious for him to claim that he acted "reasonably."

officer should receive immunity in close cases. Here, by contrast, the officer disregarded the warrant requirement. There has been no independent evaluation of probable cause and therefore the Briggs rationale is inapplicable. Indeed, the Court stressed the unique nature of the case as one involving submission of facts to secure a warrant. Id. at 1098, n.6. Just as Leon did not decide good faith exception to the exclusionary rule in the context of a warrantless arrest, Briggs went no further than a discussion of qualified immunity in the context of that case.

If petitioner had obtained a warrant, but a court later found no probable cause for its issuance, the immunity issue would be presented in a significantly different context. The exigent circumstances issue would be moot and there would be compliance with the express mandate of the Fourth Amendment

-- submission of the decision to a magistrate. Thus, in this case, depending on whether a warrant was sought, different standards must control the immunity question.

The unprecedented nature of petitioner's claim is further demonstrated by the lack of any "common law counterpart" to the immunity asserted. Malley v. Briggs, supra, at 1095. At common-law a determination that an officer lacked probable cause in warrantless action was sufficient to establish liability. In Director General of Railroads v. Kastenbaum, 263 U.S. 25, 27-28 (1923), the Court stated:

> The gist of it is an unlawful detention, and that being shown the burden is on the defendant to establish probable cause for the arrest . . . But the standard applied to defendant's consciousness is external to it. The question is not whether he thought the

> facts to constitute probable cause, but whether the court thinks they did. Holmes on the Common Law, 140. Probable cause is a mixed question of law and fact. The court submits the evidence of it to the jury, with instructions as to what facts will amount to probable cause if proved . . . But, as we have seen, good faith is not enough to constitute probable cause. That faith is not enough to constitute probable cause. That faith must be grounded on facts within the knowledge of the (arresting officer), which in the judgment of the court would make his faith reasonable.

See also Entick v. Carrington, 19 How. St. Tr. 1030, 1066, 95 Eng. Rep. 807 (K.B. 1765); Restatement (Second) of Torts, §121, Comment i:

> A peace officer making an arrest without a warrant is protected in every case where he acts under a reasonable mistake as to

> the existence of facts which, under the rule stated in this Section, justify an arrest without a warrant. On the other hand, no protection is given to a peace officer who, however, reasonably acts under a mistake of law other than a mistake as to the validity of a statute or ordinance.

There is, of course, nothing novel about these long standing common law principles. They are based on a well settled standard of reasonableness that allows for a wide latitude of official discretion.

D. The Test Proposed by Petitioner Would Work A Radical Change In The Scope And Nature Of The Immunity Defense.

The new immunity doctrine suggested by petitioner would subsume virtually all constitutional liability issues into a new, highly subjective, and unprecedented test of immunity. Instead of the Harlow standard, the new test would be whether the official "could reasonably

have believed that his (action) was legally justified." Brief, at 30. Such a transformation would bring this Court full circle, back to the unsatisfactory pre-Harlow law under which qualified immunity would depend upon the specific, discrete facts of each case, requiring full discovery and an inquiry into the subjective mental state and motives of defendants.

Davis v. Scherer, supra, deliberately eliminated the "totality of the circumstances" test in immunity adjudications in order to avoid precisely the kind of fact-specific adjudication urged by petitioner. If an immunity claim depends upon whether an official should have known whether his specific conduct violated an established right (as opposed to whether he should have been aware of a constitutional right that governs his alleged conduct), a court must insist, of course, on knowing all

of the facts and circumstances under which the defendant acted. It must also consider whether conflicting facts preclude a summary judgment motion. Thus, a primary purpose of Harlow, early adjudication of immunity, is defeated. In many §1983 and Bivens cases the actual conduct of the official is what the entire case is about and can only be resolved by a trial. A court simply cannot make a fair determination of whether the defendant's actions and conduct were violative ("clearly" or otherwise) of a constitutional standard unless every relevant fact surrounding that conduct is presented to the trier of fact.

Consider, for example, a case alleging a due process and Fourth Amendment violation for the unlawful use of deadly force. See Tennessee v. Garner, __ U.S. __, 105 S. Ct. 1694 (1985). Under Garner, the essential question is

whether the defendant had probable cause to believe that the suspect posed a significant threat of serious physical harm to the officer or others. The officer is required to show an "articulable basis to think (the suspect) was armed." Id. at 1706. Quite obviously, the courts, including this Court, have had few occasions to apply this now clearly established principle. But surely that does not mean that an officer who in fact violates this clear standard should be immune from liability solely because the specific facts in his case had not been previously litigated. This standard itself provides the margin for error needed to protect the officer -- a reasonable belief in the threat posed by the suspect. The immunity sought by petitioner would eviscerate the standard.

If this Court were to adopt petitioner's suggested standard, it would

necessitate an inquiry into all of the circumstances surrounding the officer's actions, including the subjective issues of intent, knowledge and motive. As a threshold matter, it would be important to know whether the officer -- who claims to have acted reasonably, even though in contravention of settled law -- considered the applicable legal principles. It would subvert the immunity doctrine to permit an officer, such as petitioner, whose conduct indicates ignorance or willful disregard of controlling cases in this Court, to assert that he nevertheless had a reasonable basis for believing his conduct to be legal.

Furthermore, an examination of the officer's training and experience would be necessary. This Court has ruled that the officer's experience is an integral factor in determining reasonableness under the Fourth Amendment, See Texas v.

Brown, 460 U.S. 730, 742-743 (1983); United States v. Brignoni-Pounce, 422 U.S. 873 (1975).

Petitioner seeks to collapse the very different tests for immunity and liability, and to turn the legal immunity issue into a fact-bound determination. In Mitchell v. Forsyth, supra, at 2816, n.9, this Court emphasized that the immunity issue "is a purely legal one." Petitioner would have the trial court resolve, pre-trial, the decidedly factual issue of reasonableness. See also Davis v. Scherer, supra, at 195 (on immunity claim, rejecting "inquiry into whether official in the circumstances of his decision should have appreciated the applicability and importance of the (regulation) at issue.").

This Court should not countenance a double standard. On the qualified immunity issue, plaintiffs are barred

from proving that an officer acted "unreasonably" if the officer did not violate clearly established federal laws by, for example, failing to follow a state regulation. See Davis, supra. By the same token, the defendant should not be permitted to attempt to show that he acted "reasonably" when his alleged conduct violated clearly established law. The defense of reasonableness is clearly one for trial.

E. The Purposes of Qualified Immunity Would Be Undermined By Petitioner's New Doctrine.

Petitioner's policy arguments are revealingly weak. First, to disallow a defense of immunity in this kind of case will not hold a government official to a "standard of perfection." Brief, at 29. The standards under the Fourth Amendment -- probable cause and reasonableness-- do not require anything close to perfection. Probable cause is defined by the

reasonableness of one's actions in light of all the circumstances, thus providing an ample margin of error. This doctrine "protects both the officer and the citizens." Henry v. United States, supra, at 102. The more dangerous the situation, the quicker an officer has to make a judgment and act, and the greater the risk of non-action, the more protection the officer has under the probable cause and reasonableness standards. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968); Pennsylvania v. Mimms, 434 U.S. 106 (1977). Indeed, it is only when the officer acts contrary to what a reasonable officer would do that probable cause is found to be lacking.

In this case it is particularly ironic that petitioner complains of a supposed "standard of perfection" when the record shows he did not even consider the constitutional consequences of his actions. J.A. 43-45; 46-52 (demonstrating that petitioner believed

a warrant is not required when searching for a fugitive. Under these circumstances, petitioner's claim of reasonableness is highly suspect.[6]

Petitioner makes the exaggerated claim that without this new rule "(a)n official could be subjected to monetary liability even if the relevant legal principle, and the case law applying that principle, did not provide any

---

[6]. Petitioner also seeks to equate respect for constitutional procedures and established rights with official "timidity." Brief, at 23. But this Court has made clear that where rights are clearly established, the official "should be made to hesitate." Harlow, supra, at 819. This is particularly true where the choice is not one between action and inaction, but rather, as here, action without a warrant or action sanctioned by a judicial officer. The interests of effective law enforcement -- and of the Constitution -- would have been satisfied in this case if petitioner had followed the constitutionally mandated process.

indication that the official's conduct was unlawful." Brief, at 25. But no such result is possible under Harlow since if the "relevant legal principle" is not clearly established no liability can result. Petitioner's argument rests on the demonstrably false proposition that a law can be "clearly established," but not provide "any indication" as to how an official is to behave.

This case, in which clearly stated standards of probable cause and exigent circumstances provided petitioner with more than sufficient guidelines for proper conduct, reveal the fallacy of petitioner's position. In Hobson v. Wilson, 737 F.2d 1, 26 (D.C. Cir. 1984), the court cautioned against the very position advanced by petitioner, stating that the right at issue cannot be defined "so narrowly as to require that there be no distinguishing facts between the instant case and existing precedent . . . (since this) would unquestionably turn qualified into absolute immunity

requiring immunity in any new fact situation."

There is the distinct danger that petitioner's proposed test would in effect both deny any remedy to persons whose Fourth Amendment rights are violated and directly reduce the substantive protections of the Fourth Amendment. It would certainly be argued by the Government that if this standard applies to the determination of civil liability, it should also control application of the exclusionary rule. Compare United States v. Leon, 468 U.S. 897 (1984) with Malley v. Briggs, supra. If it were so extended, the victim of unconstitutional police actions in the Fourth Amendment area would be without a remedy wherever the officer cannot be shown to have been on notice of an authoritative decision on the facts of his case. Since few of the myriad police-citizen encounters are previewed, fact by fact, in decisions of this Court

or the lower courts, such a rule would eliminate remedies in a great number of cases. And even if the Court were not to so limit the exclusionary rule, the result would hardly be more satisfactory: those who were not charged with any wrongdoing would be denied their only remedy.

More fundamentally, petitioner's standard would work a rewriting of police activity under the Fourth Amendment. Probable cause would no longer be defined as the facts and circumstances that would cause a reasonably prudent police officer to believe that the suspect had committed or was committing a criminal act (or that items would be found in a search). Beck v. Ohio, 379 U.S. 89, 91 (1964). Rather, even if the legal standard was clearly established, the issue would be whether the officer "reasonably could have believed," Brief, at 30, that his conduct would violate the plaintiff's

constitutional rights. In other words, not only would the plaintiff have to show a violation of a clearly established right, he would also have to show a violation so egregious as to dispel any notion that the officer could have believed his actions to be justified. Unfortunately, some lower courts have imposed this unjustified standard. See Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982); Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985).

Adjudication of Fourth Amendment issues would therefore no longer be based on the clearly established standard of probable cause. Since rights are defined by court decisions, the substantive standards of the Fourth Amendment would be quite unknown, and the controlling standards would reflect the immunity rule rather than the established concept of probable cause.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

David Rudovsky, Esq.
Kairys & Rudovsky
1425 Walnut Street
Philadelphia, PA 19102
215/438-4541
Attorney of Record

Michael Avery, Esq.
Avery & Friedman
Six Beacon Street
Boston, MA 02108
617/367-2626

Seth Kreimer, Esq.
Law School
University of Pennsylvania
3400 Chestnut Street
Philadelphia, PA 19104
215/898-7447

Jack D. Novik, Esq.
A.C.L.U.F.
132 West 43rd Street
New York, NY 10036
212/944-9800